United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1860

B
P/5

To be argued by
JOHN C. SABETTA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1860, 74-1869, 75-1253

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE STOFSKY, CHARLES HOFF, AL GOLD and CLIFFORD LAGEOLES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN C. SABETTA,
V. THOMAS FRYMAN, JR.,
LAWRENCE B. PEDOWITZ,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

5

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	6
Synopsis	6
The Government's Case	6
I. Introduction	7
A. The industry	7
B. The collective labor agreement and its enforcement	9
C. The defendants	14
II. The payoffs through Jack Glasser	16
A. Glasser's testimony	16
1. Sherman Brothers	17
2. Chateau Creations, Inc.	20
3. Breslin Baker	22
4. Schwartzbaum Furs	23
5. Corinna Furs	24
6. Daniel Furs	25
B. Ginsberg's testimony	27
C. Harry Jaffee's testimony	28
III. Glasser departs; the federal investigation and its obstruction	29
IV. Walter Stiel payoffs	33

PAGE

V. Daniel Grossman payoffs 35

A. Grossman's testimony 35

B. William Poulos' testimony 41

The Defense Case 42

ARGUMENT:

POINT I—The District Court properly denied defendants' first and second new trial motions ... 45

A. First new trial motion: prior proceedings .. 45

1. "The newly discovered evidence" 46

a. The East New York Savings Bank 47

b. The Greenwich Savings Bank and The Emigrant Savings Bank 49

2. The government's response 51

3. The District Court's decision 53

B. Second new trial motion: prior proceedings 54

1. The government's production of additional financial records 54

2. Defendants' second motion 56

3. The government's response 57

4. The District Court's decision 58

C. The government violated no obligation imposed by *Brady* v. *Maryland* 58

D. Due diligence by defendants would have discovered the evidence at trial 63

E. The trial court applied the correct legal standard in determining defendants' first and second new trial motions 68

PAGE

F. The trial court correctly found that the "newly discovered evidence" would not probably have produced a different verdict 71

POINT II—The indictment was valid, having been returned by an Organized Crime Grand Jury, empaneled pursuant to 18 U.S.C. § 3331, during its lawfully extended term 80

A. The April 20, 1971 grand jury: summoned, empaneled and extended 80

B. The April 20, 1971 grand jury was an Organized Crime Grand Jury, having actually been empaneled, sworn and charged as such 83

C. By his order of March 23, 1971 Judge Sugarman intended to summon an Organized Crime Grand Jury 85

D. The second extension order of April 16, 1973 was valid 90

POINT III—The jury properly found a single conspiracy among the defendants 91

POINT IV—Various other errors assigned to the conduct of the trial are without merit 97

A. Harry Jaffee's testimony was properly admitted 97

B. Glasser's testimony of the manufacturer's statements to him was properly admitted .. 99

C. The prosecutor's comments in summation on the absent manufacturers were entirely proper 101

PAGE

POINT V—The convictions of defendants Stofsky, Hoff and Gold for income tax evasion were entirely proper 106

A. Defendants were not entitled to an administrative conference with the IRS before the grand jury could indict them for income tax evasion 106

B. The evidence was more than sufficient to convict defendant Stofsky of income tax evasion 109

C. Venue for the charge of income tax evasion against defendant Gold, contained in Count 32, properly lay in the Southern District of New York 112

POINT VI—Defendants Stofsky and Gold were properly convicted of endeavoring to obstruct justice as charged in Count 24 115

A. The legal and factual predicates of defendants' guilt were more than sufficient .. 115

B. Venue properly lay in the Southern District of New York 118

POINT VII—18 U.S.C. § 1962(c) is not unconstitutionally vague 120

POINT VIII—The Strike Force attorney who presented this case to the grand jury had authority to do so 123

CONCLUSION 124

TABLE OF CASES

PAGE

Anderson v. *United States*, 417 U.S. 211 (1974) 97, 100

Barber v. *Warden*, 331 F.2d 842 (4th Cir. 1964) .. 60

Beaty v. *United States*, 213 F.2d 712 (4th Cir. 1954), *vacated on other grounds*, 348 U.S. 950 (1955) 114

Bowles v. *United States*, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971) 104

Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337 (1952) 123

Bosselman v. *United States*, 239 F.2d 82 (2d Cir. 1917) 117

Brady v. *Maryland*, 373 U.S. 83 (1963) 45, 46, 58

Broadbent v. *United States*, 149 F.2d 580 (10th Cir. 1945) 117

Brown v. *United States*, 333 F.2d 723 (2d Cir. 1964) 63, 68

Cerda v. *United States*, 488 F.2d 720 (9th Cir. 1973) 103

Cole v. *United States*, 329 F.2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964) 116

Dutton v. *Evans*, 400 U.S. 74 (1970) 101

Earl v. *United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967) 104

Fowler v. *United States*, 352 F.2d 100 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966) 112

Hale v. *Henvel*, 201 U.S. 43 (1905) 107

Hunt v. *United States*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969) 118

In Re Di Bella, Dkt. No. 75-1121 (2d Cir., July 8, 1975) Slip op. 4665 124

PAGE

In Re Kilgo, 484 F.2d 1215 (4th Cir. 1973) 104

In Re Persico, Dkt. No. 75-2030 (2d Cir., June 19, 1975) Slip op. 4129 124

Norman v. *United States*, 486 F.2d 926 (7th Cir. 1973) 88

Larrison v. *United States*, 24 F.2d 82 (7th Cir. 1928) 63

Luhring v. *Glotzbach*, 304 F.2d 560 (4th Cir. 1962) 107

Luna v. *Beto*, 395 F.2d 35 (5th Cir. 1968), *cert. denied*, 394 U.S. 966 (1969) 60

Mesarosh v. *United States*, 352 U.S. 1 (1956) 70

Morrison v. *United States*, 365 F.2d 521 (D.C. Cir. 1966) 104

Napue v. *Illinois*, 360 U.S. 264 (1959) 69

National Woodwork Manufacturers v. *NLRB*, 386 U.S. 612 (1967) 13

Nolan v. *United States*, 163 F.2d 768 (8th Cir. 1947), *cert. denied*, 333 U.S. 846 (1948) 91

Papachriston v. *City of Jacksonville*, 405 U.S. 156 (1972) 123

Smith v. *Goguen*, 415 U.S. 566 (1974) 123

Spies v. *United States*, 317 U.S. 492 (1943) 113

Sullivan v. *United States*, 340 U.S. 170 (1954) 109

United States v. *Aqueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963) 92

United States v. *Baum*, 482 F.2d 1325 (2d Cir. 1973) 18

United States v. *Bautista*, 509 F.2d 675 (9th Cir. 1975) 103

PAGE

United States v. *Becker*, 466 F.2d 886 (7th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) ... 68

United States v. *Bigos*, 459 F.2d 639 (1st Cir.), *cert. denied sub nom. Raimondi* v. *United States*, 409 U.S. 847 (1972) 96

United States v. *Bithoney*, 472 F.2d 16 (2d Cir.), *cert. denied*, 412 U.S. 938 (1973) 114

United States v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965) 92

United States v. *Briggs*, 457 F.2d 908 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972) 74

United States v. *Bruno*, 105 F.2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939).. 92

United States v. *Bynum*, 485 F.2d 490 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974) 98

United States v. *Calandra*, 414 U.S. 338 (1974) .. 107

United States v. *Canniff*, Dkt. No. 75-1078 (2d Cir., Aug. 13, 1975) Slip op. 5609 74

United States v. *Capeck*, 287 F.2d 537 (2d Cir.), *cert. denied*, 368 U.S. 847 (1961) 68

United States v. *Cioffi*, 493 F.2d 1111 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974) 115-116, 117

United States v. *Cohen*, Dkt. No. 74-2026 (2d Cir., June 26, 1975) Slip op. 4405 112

United States v. *Cohen*, 145 F.2d 82 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945) 93

United States v. *Cohen*, 384 F.2d 699 (2d Cir. 1967) 75

United States v. *Consolidated Launderies Corp.*, 291 F.2d 563 (2d Cir. 1961) 60

PAGE

United States v. *Costello*, 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958) 63, 68

United States v. *Costello*, 352 F.2d 848 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 201 (1968) 97

United States v. *Daly*, 481 F.2d 28 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973) 107

United States v. *D'Amato*, 493 F.2d 359 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974) 99, 101

United States v. *Dardi*, 330 F.2d 316 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964) 93

United States v. *De Sapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) 69, 98

United States v. *De Sapio*, 456 F.2d 644 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972) 69

United States v. *Deutsch*, 451 F.2d 98 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972) 103

United States v. *Deutsch*, 475 F.2d 55 (5th Cir. 1973) 61

United States v. *Dornau*, 359 F. Supp. 684 (S.D. N.Y.), *rev'd on other grounds*, 491 F.2d 473 (2d Cir.), *cert. denied*, 419 U.S. 872 (1974) 105, 107

United States v. *Eliano*, Dkt. No. 75-1035 (2d Cir., July 28, 1975) Slip op. 5157 124

United States v. *Fein*, 504 F.2d 1170 (2d Cir. 1974) 80, 81, 91

United States v. *Flynn*, 130 F. Supp. 412 (S.D.N.Y.), *reargument denied*, 131 F. Supp. 742 (S.D.N.Y. 1955) 68

PAGE

United States v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970) 99

United States v. *Goldstein*, 342 F. Supp. 661 (E.D. N.Y. 1972) 107

United States v. *Gray*, 507 F.2d 1013 (5th Cir. 1975) 111

United States v. *Gross*, 276 F.2d 816 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960) 114

United States v. *Grunewald*, 233 F.2d 556 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957) 116, 117

United States v. *Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973) 103

United States v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973) 69

United States v. *Lanni*, 466 F.2d 1102 (3d Cir. 1972). 101

United States v. *La Vecchia*, 513 F.2d 1210 (2d Cir. 1973) 93

United States v. *Lawson*, 507 F.2d 433 (7th Cir.), *cert. denied*, — U.S. — (1975) 88

United States v. *Lombardozzi*, 343 F.2d 127 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965) 68

United States v. *Macklin*, Dkt. No. 75-1189 (2d Cir. Sept. 4, 1975) Slip op. 5911 81

United States v. *Malizia*, 503 F.2d 578 (2d Cir. 1974) 103

United States v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 24, 1975) 94, 100, 106

PAGE

United States v. *Mancuso*, 378 F.2d 612 (4th Cir.), *cert. denied*, 390 U.S. 955 (1967) 111

United States v. *Marcus*, 401 F.2d 563 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969) 112

United States v. *Marquez*, 490 F.2d 1383 (2d Cir. 1974), *aff'g on opinion below*, 363 F. Supp. 802 (S.D.N.Y 1973), *cert. denied*, 419 U.S. 826 (1974) 63, 69, 74

United States v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973) 105

United States v. *Meck*, 462 F.2d 918 (2d Cir. 1972) 69

United States v. *Micky*, 513 F.2d 1191 (2d Cir. 1975) 97

United States v. *Miller*, 411 F.2d 825 (2d Cir. 1969) 60, 61

United States v. *Mitchell*, 384 F. Supp. 562 (D.D.C. 1974) 105

United States v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973) 97

United States v. *National Dairy Products Corp.*, 372 U.S. 29 (1963) 123

United States v. *Niedelman*, 356 F. Supp. 979 (S.D.N.Y. 1974) 107

United States v. *O'Connell*, 165 F.2d 697 (2d Cir.), *cert. denied*, 333 U.S. 864 (1948) 94

United States v. *Pecora*, 484 F.2d 1289 (3d Cir. 1973) 101

United States v. *Pfingst*, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974) 73

United States v. *Polakoff*, 121 F.2d 333 (2d Cir.), *cert. denied*, 314 U.S. 626 (1941) 117

PAGE

United States v. *Polisi*, 416 F.2d 573 (2d Cir. 1969) 68

United States v. *Puco*, 476 F.2d 1099 (2d Cir.) (*en banc*), *cert. denied*, 414 U.S. 844 (1973) 101

United States v. *Quinn*, 445 F.2d 940 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971) 59

United States v. *Ramirez*, 482 F.2d 807 (2d Cir.), *cert. denied*, 414 1012 (1973) 93

United States v. *Reide*, 494 F.2d 644 (2d Cir. 1974) 106-107

United States v. *Rosner*, 72 Cr. 782 (S.D.N.Y. Aug. 15, 1974) 70

United States v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974) 117

United States v. *Rosner*, 516 F.2d 269 (2d Cir. 1975) 69, 70, 71, 77

United States v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974) 93

United States v. *Sanchez*, 459 F.2d 100, *cert. denied*, 409 U.S. 864 (1972) 105

United States v. *Sansone*, 231 F.2d 887 (2d Cir.), *cert. denied*, 351 U.S. 987 (1956) 98

United States v. *Santana*, 503 F.2d 710 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974) 93, 100

United States v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975) 69, 71

United States v. *Silverman*, 430 F.2d 106 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971) 68

United States v. *Slutsky*, 487 F.2d 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974) 114

PAGE

United States v. *Sposato*, 446 F.2d 779 (2d Cir. 1971) 68

United States v. *Steinman*, 73 Cr. 216 (S.D.N.Y. June 29, 1973) 107

United States v. *Swann*, 441 F.2d 1053 (D.C. Cir. 1971) 119

United States v. *Turcotte*, 515 F.2d 145 (2d Cir. 1975) 118

United States v. *Wiley*, Dkt. No. 75-1082 (2d Cir. July 29, 1975) slip op. 5211 99

United States v. *Wyler*, 487 F.2d 170 (2d Cir. 1973) 101

United States v. *Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974) 95, 106

United States v. *Zane*, 507 F.2d 346 (2d Cir. 1974), *cert. denied*, — U.S. — (1975) 70

United States ex rel. Fein v. *Deegan*, 410 F.2d 13 (2d Cir.), *cert. denied*, 395 U.S. 935 (1969) 73

United States ex rel. Lucas v. *Regan*, 503 F.2d 1 (2d Cir. 1974) 59

United States ex rel. McCann v. *Thompson*, 144 F.2d 604 (2d Cir. 1944) 107

United States ex rel. Rice v. *Vincent*, 491 F.2d 1326 (2d Cir.), *cert. denied*, 419 U.S. 880 (1974) 73

Wax v. *Motley*, 510 F.2d 318 (2d Cir. 1975) 80, 81, 83, 84, 88

Zacher v. *United States*, 227 F.2d 219 (8th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956) 111

STATUTES

	PAGE
18 U.S.C. § 2	2
18 U.S.C. § 371	2
18 U.S.C. § 1406	104
18 U.S.C. § 1503	3, 115, 116, 117, 118
18 U.S.C. § 1951	2
18 U.S.C. § 1961	120, 121, 123
18 U.S.C. § 1961(1)(B)	3
18 U.S.C. § 1961(1)(C)	3
18 U.S.C. § 1962	122
18 U.S.C. § 1962(2)	3, 120, 121, 123
18 U.S.C. § 3237(a)	114
18 U.S.C. § 3331-34	80
18 U.S.C. § 3331	80, 81, 84, 85
18 U.S.C. § 3331(a)	82, 86, 87, 90
18 U.S.C. § 3331(2)	87
18 U.S.C. § 3332(b)	87, 88
18 U.S.C. § 3333	82
18 U.S.C. § 6002-6003	102
26 U.S.C. § 704	111
26 U.S.C. § 761	111
26 U.S.C. § 6103(a)	60
26 U.S.C. § 7201	3, 112, 113
29 U.S.C. § 158(e)	13
29 U.S.C. § 186(a)	2

PAGE

29 U.S.C. § 186(b) 2

Internal Revenue Code of 1939, § 145(b) 113

New York Partnership Law § 40 (McKinney's 1948) 111

RULES AND REGULATIONS

Rule 6, Federal Rules of Criminal Procedure 80

Rule 6(a), Federal Rules of Criminal Procedure .. 81

Rule 6(g), Federal Rules of Criminal Procedure ... 81

Rule 12(b)(2), Federal Rules of Criminal Procedure 124

Rule 33, Federal Rules of Criminal Procedure 3

Rule 803(3), Federal Rules of Evidence 101

Rule 804(b)(3), Federal Rules of Evidence 101

Internal Revenue Service Regulation, Section 601.107 (b)(2), 26 C.F.R. § 601.107(b)(2) .. 106, 108, 109

OTHER AUTHORITIES

Hearings on 5.30 and related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) 87

H.R. Rep. No. 91-1539, 91st Cong., 2d Sess. (1970) 87

S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) .. 122

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1860, 74-1869, 75-1253

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE STOFSKY, CHARLES HOFF, AL GOLD and CLIFFORD LAGEOLES,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

George Stofsky, Charles Hoff, Al Gold and Clifford Lageoles, officers and employees of a New York furriers union, appeal from judgments of conviction entered on May 31, 1974 in the United States District Court for the Southern District of New York, after an eleven-day trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury, and from orders of May 31, 1974, June 12, 1974 and June 4, 1975, denying their post-trial motions for a new trial and the dismissal of the indictment.

Indictment 73 Cr. 614 was filed on June 21, 1973 in 30 counts and superseded Indictment 73 Cr. 257, filed on

March 27, 1973.* Count One charged defendants Stofsky, Hoff, Gold and Lageoles with conspiring to demand and accept payments of money from union employers and to conduct the union's affairs through a pattern of racketeering activity, in violation of Title 18, United States Code, Section 371. Counts Two through Twenty-Two charged Stofsky, Hoff, Gold and Lageoles, variously, with accepting payments of money from specified union employers, in violation of Title 29, United States Code, Section 186 (b), and Title 18, United States Code, Section 2. Count Twenty-Three charged that Stofsky and Gold, by having committed the offenses charged in Counts Two through Seventeen, had conducted the affairs of the union through

---

* Indictment 73 Cr. 257 contained 48 counts and named 11 defendants, including defendants herein. As a consequence of various severance motions, the charges in that indictment were subsequently segregated into three separate indictments—73 Cr. 614, 73 Cr. 615 and 73 Cr. 616—all of which were filed on June 21, 1973, superseding Indictment 73 Cr. 257.

Indictment 73 Cr. 615 named seven union officials, including defendants Stofsky, Gold and Lageoles, and charged in 15 counts that they had violated, *inter alia*, the Hobbs Act, 18 U.S.C. § 1951, when in 1972 they compelled certain non-union fur manufacturers, so called "contractors", to close temporarily under threats of physical violence and property damage. For reasons not pertinent here, that indictment was dismissed by the filing of an order of nolle prosequi on September 10, 1974.

Indictment 73 Cr. 616 named four union fur manufacturers, Sam Sherman, Harry Hessel, Sol Cohen and Karl "Jack" Schwartzbaum, and charged in 13 counts that each made payments to one or more of Hoff, Gold and Lageoles—who as union officials represented the manufacturers' respective employees—in violation of Title 29, United States Code, Section 186(a). Sherman, Hessel and Cohen each pleaded guilty to one count of that indictment and have been sentenced by Judge Pierce to pay fines. The fourth, Schwartzbaum, was convicted of the charges against him after a trial before Judge Pierce and a jury. He too was sentenced to a fine and is presently prosecuting an appeal.

a pattern of racketeering activity, in violation of Title 18, United States Code, Sections 1961(1)(B) and (C) and 1962(c). County Twenty-Four charged Stofsky and Gold with corruptly endeavoring to influence a witness before a federal grand jury, in violation of Title 18, United States Code, Section 1503. Counts Twenty-Five through Twenty-Seven and Thirty-One through Thirty-Three charged Stofsky, Hoff and Gold, each in two counts respectively, with attempting to evade federal income tax, in violation of Title 26, United States Code, Section 7201.*

Trial commenced on February 11, 1974 and ended on February 27, 1974 when, with respect to the 25 counts submitted to it, the jury found each of the four defendants guilty of each count in which he was named.**

On April 22, 1974, Stofsky, Hoff, Gold and Lageoles moved pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial premised on alleged "newly discovered evidence" which established that Jack Glasser, one of several principal government witnesses, had perjured himself. That motion was denied in open court on May 31, 1974 (A 799a),*** and in a Memorandum Opinion of Judge Pierce dated June 12, 1974 (A 791a-808a).

---

* The 30 counts of Indictment 73 Cr. 614 were numbered 1-27 and 31-33.

** Counts 8, 13, 21, 22 and 31 were dismissed on the government's motion at the close of its direct case (Tr. 1162).

*** References preceded by "A" refer to the Appendix; "AA" to the Supplemental and Additional Appendix; "GX" to a government exhibit; "DX" to a defense exhibit; "Tr." to the transcript of the trial; "Ct. Ex." to a court exhibit; "SG Br." and "2SG Br." and "HL Br." and "2HL Br." to the main and supplemental briefs herein of Stofsky and Gold, and Hoff and Lageoles, respectively.

On May 31, 1974, the Court imposed on each of the defendants sentences of the following character:*

George Stofsky	Three years imprisonment and fines totaling $13,000.
Charles Hoff	Three years imprisonment and fines totaling $11,000.
Al Gold	Two years imprisonment and fines totaling $10,000.
Clifford Lageoles	Two years imprisonment, the execution of which was suspended, a two-year period of probation and fines totaling $2,000.

Execution of the sentences was stayed pending the determination of defendants' appeals from their convictions, except that Lageoles began the service of his period of probation.

On June 10, 1974, defendants noticed appeals from their convictions, and in connection therewith filed briefs in this Court on August 1, 1974 (Stofsky and Gold) and August 8, 1974 (Hoff and Lageoles). Prior to the scheduled filing of the government's brief on September 27, 1974, the government advised counsel for defendants, by letter dated September 3, 1974, that in connection with the continuing investigation of the fur industry the government had obtained additional financial records of government witness Jack Glasser, which were available to defense counsel for review if they desired (AA 22). On September 26, 1974, pursuant to a stipulation among the parties, this Court, per Honorable Walter R. Mansfield,

---

* For the specifics of the somewhat complicated sentences, see A 780a-790a.

ordered all then pending appellate proceedings herein stayed until such time as the United States District Court for the Southern District of New York heard and determined defendants' second new trial motion premised on alleged newly discovered evidence, which was to be filed in accordance with a stipulated schedule (AA 25-28).

By notices of motion dated October 9 and 10, 1974, and premised on the financial records made available by the government, defendants moved a second time for an order granting a new trial (AA 7-8). While that motion was *sub judice*, defendants, by notice of motion dated January 23, 1975, moved for an order dismissing the indictment as invalid, on the ground that it had been voted by a grand jury at a time subsequent to the expiration of that grand jury's lawful term (AA 90-91).

Finally, by notice of motion dated March 24, 1975, defendants moved again for an order dismissing the indictment on the ground that the prosecutor who presented the case to the grand jury was not properly authorized to represent the United States and appear before the grand jury (AA 132-133).

By a Memorandum Opinion and Endorsement Orders dated June 4, 1975, Honorable Lawrence W. Pierce, United States District Judge, denied each of the three motions (AA 83-87, 128-130, 148). Appeals from those orders were noticed by defendants and consolidated with their earlier pending appeals.

Statetment of Facts

Synopsis

The evidence established that defendants George Stofsky, Charles Hoff, Al Gold and Clifford Lageoles, officers and employees of the Furriers Joint Council of New York, a labor union, from 1967 through 1971 corrupted the conduct of that union's affairs for personal gain. During that period defendants received and conspired to receive from certain union fur manufacturers a continuing flow of cash payoffs, ranging from $50 to $6,000, in return for permitting those manufacturers—who were faced with a declining market and seasonal labor needs—to violate the collective labor agreement's provisions proscribing sub-contracting to non-union shops and restricting overtime work.

The scheme and defendants' roles therein, as well as defendants' efforts to obstruct a federal grand jury investigation of the furriers industry, were laid bare by the testimony of, among others, three union fur manufacturers who made certain of the payoffs charged, either directly or through intermediaries, to defendants; Jack Glasser, a manufacturer's representative, who functioned as a "bag-man", ferrying payoffs from manufacturers to various of the defendants; and Harry Jaffee, a former union business agent who confirmed that he had accepted such payoffs in return for ignoring certain manufacturers' violations of the collective labor agreement.

Each of the defendants testified and denied his guilt and the receipt of any such payoffs. None, however, was able to provide an innocent explanation of defendants' solicitous treatment of Glasser after his role as a "bag-man" became known by federal authorities and the fur industry generally, nor of the government's documentary

proof that the union had treated with extraordinary leniency violations of the collective labor agreement, even where open and notorious, when they had been committed by those manufacturers shown by the proof to have been making payoffs.

The Government's Case

I. Introduction

A. The Industry

For over 60 years the manufacture of fur garments in New York City has been the product of the sometimes joint efforts of a union and a non-union sector (A 354a). Both have co-existed in, and been largely confined to, the limited area encompassed by 27th through 30th Streets, from 6th to 8th Avenues in Manhattan (Tr. 75). Historically, each has been sharply aware of and in some measure dependent upon the activities of the other (A 403a-404a).

At the time of trial herein, there were some 5,000 industry employees who were members of the Furriers Joint Council of New York (Tr. 78). Almost invariably they were men who had spent many years in the industry, and averaged 55 to 60 years of age (Tr. 77). They worked for one of the approximately 600 union manufacturers in shops which ranged in size from one to several score employees (A 354a-355a). The bulk of the union manufacturers were themselves organized into several trade organizations, the largest of which—with some 350 member firms—was the Associated Fur Manufacturers, Inc. ("Association") (Tr. 75).* Relations be-

---

* In addition to the firms which were members of the other trade organizations not pertinent here, a relatively small number of union manufacturers signed individual contracts with the union, modeled on the agreements signed by the trade organizations (A 355a).

tween the Association firms and their employees were regulated by a collective labor agreement ("agreement"), which was renegotiated every three or four years by the union and the Association on behalf of their respective members (GX 1, 2).

Interspersed among the same buildings and streets occupied by the union manufacturers were the premises of some 350 to 400 non-union manufacturers called "contractors" (see Tr. 696; A 353a). The latter shops were usually small and generally had fewer than a dozen employees. They were staffed, most often, by immigrant Greeks who were paid less and received fewer benefits than the union employees. Lacking the money to purchase the costly skins and unable to produce their own garments, the shops of these contractors worked solely for one or more union manufacturers, producing for them, at approximately two-thirds of the union labor cost, entire fur garments or performing some part of the process of production, frequently "finishing", for fur garments otherwise manufactured in the union manufacturer's shop (Tr. 81-82, 118-119; A 351a-354a).*

---

* The conversion of skins into finished garments requires a series of integrated steps and the services of a variety of craftsman—called "mechanics" (Tr. 81-82). In giving out work a union manufacturer, typically, will have one of his employees hand-deliver either a bundle of skins, tagged with the union firm's seal (*e.g.*, GX 43), or some unfinished garments to the contractor's shop, where they are converted into finished fur garments and thereafter redelivered by hand to the nearby union manufacturer's premises. While defendants at trial asserted generally that the above-mentioned movement of skins and garments was accomplished by subterfuge (A 358a-359), the evidence concerning the manufacturers pertinent to the trial was clearly to the contrary. See, *e.g.*, A 251a, 261a, 316a-317a; Tr. 717-718, 931-932.

B. The collective labor agreement and its enforcement

During the period 1965 through 1972, each successive agreement between the union and the Association (GX 1, 2, 27a) resulted in increasingly favorable benefits to the employees and commensurately higher labor costs to the employer manufacturers (A 356a).* In a seasonal and contracting market (Tr. 75-77),** numerous union manufacturers sought to meet their episodic, increased production needs by means other than the accretion of ad-

---

* Wages and holiday and vacation benefits accorded a "regular employee", *i.e.*, one who has completed two weeks employment (see, *e.g.*, GX 1, pp. 5-6) all increased. Required manufacturer contributions to the industry Health and Retirement Funds, which were calculated as a percentage of the firm's straight and overtime payrolls, increased from 9% in 1965 to 18% in 1972. Under the 1972 agreement, such contributions average $1300 per year for each "regular employee" regardless of the latter's actual length of employment (A 380a; GX 27a, pp. 17-18). Under that same agreement, any individual who becomes a "regular employee" is thereafter guaranteed 26 weeks' wages, whether he works or not (*id.* at 10).

** Reflecting the impact of foreign competition, changing tastes and the activities of animal conversationists and the fake fur industry, the number of local manufacturers declined by 40 percent (Tr. 1239); from January 1970 to June 1971, alone, 115 local union manufacturers ceased operating (Tr. 1238). The membership of the Association dwindled from approximately 800 to 350 firms; and union membership shrank substantially (Tr. 1355). Notwithstanding these grim economic facts, defendants assert that the "great majority" of union manufacturers did not give out work to contractors (SG Br., p. 6). The accuracy of that may be best tested by reference to their own testimony that at the times relevant herein there were some 400 such contractors at work exclusively for union manufacturers (A 353a); and that the practice itself constitutes one of the greatest evils facing the industry (see, *e.g.*, Tr. 1299; GX 2, pp. 22-25).

ditional union workers, who after two weeks would become "regular employees"—with all of the attendant financial burdens for the manufacturer.

As alternatives, union manufacturers gave out work to contractors and, to a lesser extent, bought from outside sources ready-made garments of the line made within the firm's shop—commonly called "jobbing"*—and worked the firm's regular employees for hours in excess of the regular work week. Under the provisions of the agreement, contracting was strictly prohibited and jobbing and overtime work closely regulated (see GX 1, 2, 27a).

In theory, both the Association and the union regarded violations of the foregoing provisions as threats to the industry's health; and the agreement provided that representatives of each were jointly to investigate any such alleged violations. In practice, however, the Association consistently declined to initiate any such investigations,

---

* Under specified conditions, a manufacturer was permitted to job (Tr. 190) from "sources whose workers work under the terms and conditions prevailing in the industry"—in reality union shops only (see, *e.g.*, GX 1, p. 18). Jobbing from non-union sources, often foreign manufacturers, was entirely proscribed (A 411a). These latter non-union sources did not and could not by definition include local contractors who simply were financially unable to purchase the costly fur skins necessary to produce complete garments. A union manufacturer might seek to camouflage contracting by providing a contractor with skins which the manufacturer had purchased in the contractor's name; from those the contractor would produce complete garments which were, ostensibly, his own. Thereafter, he would purport to sell those garments to the manufacturer, but charge the latter only for the cost of labor. While on its face this would constitute illegal jobbing by the manufacturer, the agreement provided that this tissue-thin subterfuge be treated as, and for, what it was—contracting—subject to exactly the same harsh penalties (*id.*).

file complaints or prosecute manufacturers for violations of the foregoing provisions (Tr. 87-88; A 170a). It chose instead to act as the advocate for the interests of any member firm so accused by the union.

A charge originated with the filing of a complaint by a union business agent, on the back of which was recorded the manufacturers' response initialed by the representatives of both sides.* If the union and Association representatives were unable to adjust the dispute, and no subsequent private settlement was forthcoming,** the union could choose to calendar the matter for resolution, in a quasi-judicial process, before a committee headed by an Impartial Chairman (Tr. 87-88, 155-156, 530-533). Convictions for violations of the aforementioned provisions, in order of their perceived seriousness, were punishable as follows (see generally GX 1, 2, 27a):

---

* While the filing of an overtime complaint required the joint presence of union and Association representatives, usually in the form of an Overtime Committee, a complaint alleging a contracting violation could be filed by the union representative acting alone (A 129a).

** Private settlement terms were not limited by any of the agreement's provisions and included fines up to $10,000 and sometimes a manufacturer's agreement to add a specified number of union workers to his factory (see A 60a; *infra*, p. 41).

Contracting	
1st conviction growing out of isolated or minor transactions	payment of labor cost plus liquidated damages not to exceed $1,000
1st conviction involving a system of violation (*i.e.*, a number of garments at one time, or the repeated giving out or purchase of garments	three months suspension from the protection of the agreement *
2d convictions for systemic violation	one year's suspension from the protection of the agreement
Jobbing	
1st conviction	a minimum of $300
any subsequent conviction	a minimum of $1,000 and/or three months suspension
Overtime	
1st conviction	$150
2d conviction	$300
any subsequent conviction	suspension from the protection of the agreement for a period to be specified by the Conference Committee

While the determination of the penalty to impose rested with the Impartial Chairman, the union's advocate, by his recommendations, played a principal role in the final result (see A 114a).

---

* The agreement prohibited the union from conducting strikes against union manufacturers. Once suspended, however, a manufacturer lost the protection of that prohibition and could legally be struck (Tr. 90).

Although the foregoing sanctions were unavailable to police contractors' activities, the union was capable of interrupting and closing down their shops by means of pickets, boycotts, sharply worded requests and other forms of economic coercion uniquely sanctioned by law (A 422a-423a).* For this, as with much else, the union used individuals from its 11-man staff (A 493a), and numerous others, including rank and file members who were sometimes paid for their efforts (A 471a).

The union's ability to detect violations of the agreement's provisions was the product of its on-site inspections of the factories of both manufacturers and contractors, its physical surveillance of the marketplace which provided both information and evidence in the form of "catches" ** and information of such violations supplied by elevator operators, truckdrivers, competing contractors (A 508a), various skin dealers, the offending manufacturer's competitors and a manufacturer's union employees who, perforce, knew if their employer was contractng out the performance of some portion, or all, of his process of production (A 411a-412a). In this the union's interests were greatly furthered, moreover, by reason of its undisputed knowledge of the identity and location of virtually every contractor in the market (A 353a, 421a) and its right to inspect, upon demand, a

---

* The Landrum-Griffin Act § 704(b), 29 U.S.C. § 158(e) (1959), singularly protects organized labor in the garment industry—of which the furriers are concededly a part—in its use of such measures against third parties to enforce a collective labor agreement's provisions against contracting. *See National Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 637-638 (1967).

** A "catch" occurs, most typically, when the union apprehends an employee of either the contractor or manufacturer in the process of delivering to the latter garments which have been manufactured in whole or in part by the contractor.

manufacturer's payroll, shipping, sales, purchase, production and cash books records (Tr. 91-92; A 412a; see, *e.g.*, GX 2, p. 23).

In contrast, the Association * was a largely impotent organization—reflecting the fundamental weakness of its members (A. 105a). It was without power, legal or otherwise, to prevent the union from filing an unfounded complaint charging a manufacturer with a violation of the agreement's provisions; to prevent an analysis of the firm's books by union officials (A 412a); to prevent the union from calendaring and prosecuting the matter before the Impartial Chairman (A 170a); and to restrict union recommendations regarding the size of any penalty to be imposed.

C. The defendants

At the time of trial, each defendant had been more or less continuously a part of the Manhattan fur industry —first as a worker and later as an union official—for some 30 to 40 years. Each had worked with the others in his capacity as an union official for a minimum of approximately 10 years.

George Stofsky, 49, was and had been since 1959 the union's Manager; and for four years prior to that had been a business agent. As the union's chief administrative officer he was responsible for supervising the work of the other ten members of the union staff and for formulating and implementing policy (A 350a-351a). Additionally, like Charles Hoff, he was a member of the Board of Trustees of the industry's Health and Retirement Funds (A 351a).

---

* Further, the Association proved powerless to prevent the union from violating the agreement at will by conducting numerous illegal strikes against union manufacturers who had not been suspended from the protection of that agreement (see Tr. 90).

Charles Hoff, 55, was one of two Assistant Managers and had been since 1962. From 1953 to 1962 he had served as a business agent. Though Assistant Manager, he acted as business agent for four of the larger firms and assisted other business agents with problems they had. He was a member of the conference committee that negotiated each agreement. Additionally, Hoff was the union's chief advocate and played the principal role in determining whether to prosecute a manufacturer charged with a violation of the agreement, represented the union in any private settlement discussions which might follow, and played the principal role in determining whether to calendar the matter for action before the Impartial Chairman. In any such proceeding before the latter, he bore principal responsibility for determining what penalty to seek (A 453a-455a, 490a-493a).

Al Gold, 63, was the union's Organizer and had been since his appointment by Stofsky in 1959. Together with the seven business agents he had the principal responsibility for tracking down deliveries of garments from contractors to manufacturers and vice versa (A 55a) and for enforcing the agreement's provisions regarding overtime work. He was responsible for the organization and conduct of strikes and picket lines (A 459a-461a; Tr. 1437-1439).*

Clifford Lageoles, 55, was one of seven business agents and had been since 1965. He was assigned to approximately 100 union ships within a small district and attended to the grievances of the workers therein,

---

* Defendants' assertion that Gold was "primarily concerned with organizing non-Union shops" (SG Br., p. 9) is unsupported by the record. From Gold's own testimony it is clear that virtually all of his time was spent, ostensibly, in seeking to enforce the agreement's provisions regulating contracting and overtime work.

generally acting to see that their contractual rights and benefits were protected (A 438a-441a). It was his responsibility to know what was happening in all of the shops, including in any contractors' shops, in the buildings to which he was assigned (Tr. 1173; A 404a). As a business agent, he and Hoff jointly decided whether to prosecute a given complaint and, if so, what penalty to seek; and he and Hoff jointly conducted any private settlement talks (A 454a-455a).

II. The payoffs through Jack Glasser

A. Glasser's testimony

For 34 years, until his departure from the industry in 1970 at the age of 64, Jack Glasser was employed by the Association as one of its five labor adjustors. In that capacity he was assigned to the Manhattan district of 30th Street between 7th and 8th Avenues and the odd-numbered buildings on 29th Street between 6th and 7th Avenues, and to several other shops; he provided the initial representation for the interests of the Association member firms within his district in any labor dispute they might have with the union.*

In his rounds as labor adjustor, Glasser had virtually daily contact with many members of the union's 11-man staff and access to the union manufacturers within his narrow district (Tr. 91-92). So situated, he was perfectly placed to serve as the "bag-man" between those union manufacturers in his district who sought to pay cash for permission to violate certain of the agreement's provisions

---

* The number of Association firms within his district contracted over the years from 125 in 1967 to 80 in 1970 (A 104a).

restricting the means of production and those well-placed union officials who alone could provide the assurance that such violations would go largely or entirely unpunished. In each instance a principal of the firm first asked Glasser if such an arrangement with the union could be established. Glasser advised he would check and thereafter obtained the agreement of one or more of the defendants. He reported the fact of agreement to the firm's principal, whereupon the size and mode of the payments were determined. Periodically thereafter Glasser collected the cash payoffs from the firm and delivered them to the defendants involved, retaining a share for himself. During the life of that arrangement, the firm making the payoffs experienced highly favorable union treatment of their violative conduct.

From 1967 through 1969, Glasser performed that function without detection. In 1970, as more fully described herein, he was fired after his employer charged him with serving as the union's bag-man. With Glasser out of the market, payoffs through him ended and incriminating rumors of the payoff scheme abroad in the market, union officials sought to shield themselves from a fate similar to Glasser's by exacting harsh sanctions for violations of the kind they had earlier virtually ignored.

1. Sherman Brothers (Counts 1, 6-8, 23 and 27)

In 1966 or 1967,* Ben Sherman asked Glasser if his firm could obtain union permission to give out some of its

---

* Glasser's recollection was that this first conversation with Ben Sherman occurred in 1967, noting that at the time Ben Sherman was seriously ill, suffering from an incurable disease (A 51a-52a). Defendants produced a document apparently evidencing that Ben Sherman had died one year earlier (DX AO).

work to contractors in the busy season. Glasser spoke to Hoff who agreed to permit the firm to do so. Glasser reported to Sam Sherman, with whom he dealt from that point on, that it was all right for the firm to give out contracting. For the privilege of so doing Sherman agreed to pay $1000 a year in $500 installments in or about July and December (A 51a-52a). Hoff approved the foregoing and, after telling Gold Sherman was contracting out work and that he would be taken care of if he ignored that fact, Glasser received Gold's agreement as well. Pursuant to the foregoing, in July and December of 1967 and 1968, Glasser received $500 in cash from Sam Sherman, of which he kept one-third (A 53a-57a, 59a).*

---

* The government sought to establish where the other two-thirds had gone in each of those years but defendants objected (Tr. 95). The trial court sustained the objection and declined to permit the government to elicit such proof (Tr. 107-108). This was a consequence of the fact that defendants had moved before trial for an order requiring pre-trial disclosure by the government of the identity of its prospective witnesses. The trial court denied that blanket request but, relying on *United States* v. *Baum*, 482 F.2d 1325 (2d Cir. 1973), directed the government to supply to defendants before trial the name and address of any witness who would testify to "racketeering activities" not charged in the indictment (A 42a). The government advised the Court and counsel by letter dated January 4, 1974 that there was no witness who would so testify. The trial court determined that the government's letter representation precluded it from eliciting Glasser's testimony that the manufacturers named in the indictment began making payments through him to one or more of the defendants at times which antedated those charged in substantive Counts Two through Twenty-Two of the Indictment. The trial court reached that determination notwithstanding that the testimony was offered as probative of the origins, formation and operation of the Taft-Hartley objective of the conspiracy charged in Count One and that defendants had evidenced by their pre-trial motions and otherwise their knowledge that Glasser was to be a government witness. The government was permitted, however, to elicit testimony of conversations and acts in the indictment which were in furtherance of the conspiracy charged.

In July 1969 Glasser received from Sherman another $500 of which he kept one-third, giving in cash one-third each to Hoff and Gold. During a visit to the shop one week later Lageoles, then the business agent, voiced his suspicion that the firm was contracting. At Sherman's behest Glasser met with Lageoles, told him he would be taken care of if he ignored the violations and later paid him $100 in cash that Sherman had provided for that purpose (A 57a-58a).* In December 1969 Glasser again received $500 from Sherman. He kept one-quarter and dispensed the remainder equally to Hoff, Gold and Lageoles (A 58a).

Despite the existence of contracting violations throughout this period, the union took no action at all against the firm in 1967 and 1969. In 1968 a business agent not assigned to Sherman's shop made a "catch" of contracting work being delivered to the latter and filed a complaint (GX 3). Despite the fact that the contractor, Sam Haber, admitted to the business agent that he had made over 200 garments for Sherman—which had been delivered to the latter on at least four separate occasions (see GX 3), the complaint was settled privately—presumably with Hoff's participation—and Sherman was given a "slap on the wrist" and a token fine of $200 (A 117a). That sum was deducted from Sherman's next payment to Glasser (A 60a, 119a).**

---

* Sherman had begun making these payments at a time when the union business agent for his shop was William Woliner. Woliner, who was elderly and rarely, if ever, visited Sherman's shop (A 116a), retired sometime prior to 1969. There was no evidence Woliner had ever been corrupted by payoffs and Glasser testified he had never approached him in Sherman's behalf (A 116a).

** Sherman understood his payments through Glasser could not guarantee he would never be caught contracting. There was no evidence that all 11 union officers were the recipients of illegal payoffs or could be bought off. What Sherman paid for and received was immunity from the imposition of harsh fines or a suspension and subsequent strike if he were caught contracting on the scale evidenced by GX 3 (A 119a).

In August 1970, with Glasser hospitalized and out of the market, Sherman fired a worker who then reported to the union that Sherman was giving out work to contractors (A 88a-89a). In token response to this complaint and Glasser's enforced absence, Lageoles and Arthur Schifrin—the latter a business agent who apparently had not been corrupted—visited Sherman's Shop and found in plain view at least 18 ponchos which had been manufactured in violation of the provisions against contracting. Notwithstanding this "catch" in Schifrin's presence (GX 60), the matter was settled on August 14, 1970 with the payment of a fine of only $250 (A 420a).* In neither of the foregoing complaints did the union conduct an examination of Sherman's books ** or take any action against his contractors (A 450a-451a).

In November 1970, after Glasser had left the fur industry, the union charged Sherman with giving out finishing contracting (GX 61). As a result, Sherman was fined $2,500 and ordered to add four union employees to his shop (Tr. 1425).

2. Chateau Creations, Inc. (Counts 1, 9-13, 23, 27 and 29)

Chateau Creations, Inc. manufactured only pile and cloth coats, but in that process employed eight to ten union furriers and, in the busy season, five or six non-union employees. The firm, which was a member of the Association and a party to the agreement, was owned in part by Harry Hessel (A 61a-62a).

---

* Lageoles, in attempting to explain away the fine's small size, testified that he and Schifrin had found only two such ponchos (A 455a). When later cross examined and confronted with the official complaint which showed a "catch" of 18 ponchos, Lageoles admitted the latter was correct (Tr. 1420; GX 60).

** The August 8, 1970 "catch" (A 450a-451a) at the shop's premises resulted in no union examination of Sherman's books, notwithstanding Stofsky's testimony that upon such a "catch" the union "invariably" conducted such an examination (A 408a-409a).

In July or August 1967, Hessel asked Glasser if he could arrange protection from union harassment in connection with the firm's use of finishing contractors and its employment of non-union labor (A 126a). Glasser said he would let Hessel know and thereafter obtained the agreement of Hoff and Gold,* advising them that Hessel was willing to pay for the privilege of giving out contracting and employing non-union labor. Glasser reported to Hessel that the matter had been arranged; and Hessel agreed to pay $2,000 a year, in four installments.

In the rest of 1967 and then in 1968 Glasser received from Hessel a total of $1,500 and $2,000, respectively, of which he kept one-fourth. In 1969 Glasser again received a total of $2,000 from Hessel, kept one-fourth and dispensed the remainder equally to Hoff, Gold and Lageoles (A 61a-68a, 327a).**

During the period of 1967 through 1970, the union took no action of any kind against the firm (A 68a). In June 1971, after Glasser had left the fur market, a contracting "catch" was made and a complaint filed. The firm was later fined $2,500 and directed to add six union employees (A 447a-448a).***

---

* Gold was already aware that Hessel's firm was giving out work because he had several times raided that firm's finishing contractor (A 63a).

** By 1969 Lageoles had become the shop's business agent. Early in that year, he visited the shop with Glasser and began asking questions about the firm's use of non-union labor. Glasser ushered Lageoles downstairs where he told him of the firm's practices and, from a $500 cash payment recently received from Hessel, gave Lageoles the first of four $125 payments from that firm (A 66a-67a).

*** Defendants assert speciously that the union prosecuted Hessel's firm in 1971 and extracted from it the harsh fine and penalty mentioned above as a result of information it allegedly

[Footnote continued on following page]

3. Breslin Baker (Count 27)

In July 1968 Breslin Baker advised Glasser he was prepared to pay to establish and maintain a shop with only a few union employees and little or no production capacity for most of the year, during which time he would contract out his production needs. Glasser advised Hoff of Baker's proposal and Hoff agreed (A 68a-71a).

Glasser informed Baker a deal had been struck and Baker agreed to pay $1,000 a year in two $500 installments. In each of 1968 and 1969 Glasser received $1,000 from Baker, of which he kept half. He testified that in 1969 he gave the other half to Hoff (A 73a).

At some point during these payoffs, the business agent assigned to the shop, Jack Ziebal, told Glasser he was going to ask for an examination of Baker's books. Glasser advised Hoff of Ziebal's intent and suggested that they, and not Ziebal, conduct any such examination. He and Hoff thereafter performed a superficial examination of that firm's books, preempting Ziebal and, ostensibly, found nothing (A 73a).

Although Breslin Baker had been fined heavily in 1965 and 1966, no fine or other penalty was imposed on

---

acquired, a year earlier, that Glasser had received payoffs from certain manufacturers (SG Br., p. 11 n.*). That assertion not only finds no support in the record but it completely contradicts Lageoles' testimony at trial. The latter had there asserted that the union was fully aware of the firm's use of non-union labor throughout, but that no action was taken against it because of its precarious ties to the fur industry and the possibility it would become part of the cloak and garment industry if pushed too hard—with the consequent loss of jobs to union furriers (A 444a-445a). Lageoles never explained what supposedly happened to dissipate those union concerns in 1971 when the harsh sanctions described above were imposed.

that firm during the period of the above described payoffs (A 74a-75a). In November 1970, after Glasser had left the market, Ziebal filed a contracting complaint (GX 62 A), charging that the firm had not had a manufacturing shop all year. Through the intervention of Henry Katcher, an executive of another union manufacturer, and meetings he held with Stofsky and Hoff, the charges against Baker were settled privately for $500.*

4. Schwartzbaum Furs (Counts 1, 18-21 and 27)

In 1968 Schwatrzbaum told Glasser his firm was jobbing and importing furs from non-union sources in violation of the agreement and that he would like to continue to do so without union harassment. He asked if anything could be done, and Glasser replied he would let him know (A 75a-76a).

Glasser related Schwartzbaum's remarks to Hoff, who gave his approval to the plan (A 76a). Thereafter Schwartzbaum, with Hoff's agreement, paid Glasser $900 in each of 1968 and 1969—in three equal payments beginning in June or July and every three months there-

---

Stofsky and Hoff denied they had ever met with Katcher in connection with the resolution of this Baker dispute and denied they had received any money from Baker through Katcher (A 376a-378a, 555a-557a). That testimony was flatly contradicted by Katcher, who was called by the government in rebuttal (A 605a-609a). Although the trial court, because of its earlier ruling described at page 18 n., *supra*, declined to permit Katcher to testify that beginning with the November 1970 dispute and thereafter, he had delivered envelopes of money from Baker to Stofsky and Hoff (Tr. 1738-1742), Katcher was permitted to testify that he had had several meetings with Stofsky and Hoff regarding the November 1970 complaint against Baker and that he had successfully mediated that problem, with Baker being fined only $500 (A 608a).

after. Glasser testified that in each year he kept one-half and that in 1969 he gave half to Hoff (A 75a-78a, 82a-83a).

In 1969 during a visit to the shop, the business agent, Harry Jaffee, noticed a rack of garments clearly not manufactured by the firm and started to ask questions regarding their origin. Glasser, who was present, suggested to Jaffee that they talk about it, ushering him downstairs. There he told him to forget what he had seen and that the firm had been given the right to operate in that fashion. Glasser later gave Jaffee $100 in cash provided by Schwartzbaum for that purpose (A 77a-78a).

During the period of the above-mentioned payoffs, no complaints were filed or fines assessed against Schwartzbaum Furs (A 78a).* On September 18, 1970, after Glasser had left the market, the union charged Schwartzbaum Furs with contracting violations, for which the firm was later fined $3,500 and directed to add six employees to its factory (A 415a).

5. Corinna Furs (Counts 1, 14 and 23)

Corinna Furs was owned by Sol Cohen. In 1968 Cohen told Glasser he wanted to employ his workers in violation of the overtime provisions of the agreement without fear of union harassment and that he was willing to pay for the privilege. Glasser advised Cohen he would

---

* In May 1969, at a time when many union workers were without jobs, and prior to any payments from Schwartzbaum to Glasser for that year, the union conducted a general strike against those firms which were importing furs. Schwartzbaum's workers apparently joined the resultant picket lines for about a day and a half (A 170a). At the union's direction, Schwartzbaum later paid to his workers $400 for their lost time, but no penalty was imposed (GX 58 *id.*).

let him know and thereafter related Cohen's proposal to Gold. Gold agreed (A 78a-80a).

For each of the two months of the busy season in 1968, beginning in July or August, Cohen payed Glasser $100; and paid $50 a month for each month thereafter. Of the total $300 to $400 for that year, Glasser kept half. In 1969 Cohen paid Glassser $300 in six monthly installments of $50, beginning in July. Glasser split each such payment with Gold (A 79a-82a).

Two or three times during each of 1968 and 1969 Gold, who was in charge of dispatching overtime committees to investigate violations, provided Glasser with forewarnings of such committee visits he had scheduled to Corinna Furs. Glasser warned the firm and the ensuing visits by the committee, not surprisingly, produced no evidence of any violation. During the period of these payoffs the firm was neither fined nor struck in connection with overtime violations (A 82a-83a).

6. Daniel Furs (Counts 1, 15 and 23)

Daniel Furs, owned by Daniel Ginsberg, was an Association member located on West 29th Street, outside of Glasser's district (A 83a).

In April 1969 Ginsberg asked to see Glasser. Glasser, who did not service Ginsberg's firm, asked why, and Ginsberg replied that some third party had told him that Glasser could help him (A 84a). Ginsberg advised that he had been giving out contracting and wanted to continue to do so without the threat of the union apprehending him. Giving him the name and address of a contractor whom he had been using, he asked Glasser whether anything could be done. Glasser said he would let him know (A 84a-85a).

Glasser advised Gold of Ginsberg's request and Gold agreed. Glasser reported to Ginsberg that he had secured union agreement. For the privilege so acquired, Ginsberg paid $1,000 to Glasser in May 1969. Glasser later gave Gold $500 of that money and the name and address of the Ginsberg contractor. Gold agreed to stay away from the latter (A 85a-86a, 124a).*

In October 1969, following a complaint for contracting, two business agents, Schifrin and Logios, and Sidney Reiss, the Association representative, visited Ginsberg's shop and prepared so-called joint examination papers. Those papers reflected approximately $22,000 in work given to the firm's contractors, principally Lou Waxman and Royal Fashion. Glasser learned of this shortly thereafter and contacted Ginsberg, who confirmed the foregoing and expressed great concern. Glasser told Ginsberg not to worry and called Gold, who said he did not know of and had no control over what had happened. Later that day Glasser met with Stofsky, who was by then aware of the book analysis documenting Daniel Furs' use of contracting. Glasser advised Stofsky that Ginsberg had been paying Gold and him for that very privilege, and that if the union prosecuted the matter Ginsberg's

---

* Defendants' assertion (SG Br., p. 24) that Glasser was unable to identify the reason for the payment to Gold is simply false. Glasser testified Gold was paid to ignore a particular series of contracting work, performed by contractors whom Glasser identified to Gold (A 123a). Further, since the firm was out of Glasser's district and not serviced by him, Glasser was, *a fortiori*, unable to guarantee Ginsberg protection against a contracting "catch" by some honest business agent. Indeed, there was such a "catch" which went unprosecuted as a result of Glasser's successful inducement of Stofsky to smother it in their joint interests. See text.

angry revelations would be broadcast throughout the market, jeopardizing all of them. Stofsky agreed it would be better for all simply to inter the prosecution quietly, and nothing further was ever heard of the matter (A 87a-88a).

B. Daniel Ginsberg's testimony

Ginsberg, who was retired from the fur business, testified that in 1969 his firm, Daniel Furs, was unable to meet increased production needs with its own employees; and that he asked his shop foreman if he knew of anyone who could arrange for a way to give out contracting. At the foreman's suggestion, Ginsberg related his request to Glasser, who said he would let him know. Glasser then secured permission for the firm to give out work to its contractors, Royal Fashion Furs ("Royal Fashion") and Lou Waxman, both of whom Ginsberg had identified for Glasser. For the privilege of so doing, Ginsberg paid $1,000 (A 187a-189a).

Ginsberg thereafter employed those contractors and, beginning in June 1969, paid them with the firm's checks. Each of the many such payments made thereafter was recorded in the firm's cash book (A 190a-191a; GX 12).

In October 1969 business agents Logios and Schifrin conducted an examination of the firm's books, uncovered irrefutable evidence of the firm's use of contractors, and generated the so-called joint work papers reflecting the firm's use and payment of those contractors (A 191a-192a; GX 15). Ginsberg, greatly concerned, spoke to Glasser who told him not to worry; that "he will take it up with either Hoff or Stofsky and 'we will have it fixed'" (A 193a). As a result, no union action was ever taken against

the firm and nothing further was ever heard of the matter.*

C. Harry Jaffee's testimony

Harry Jaffee had been a union business agent for 21 years until his retirement in 1971 at the age of 66 (Tr. 982). He testified that during the period of 1967 through 1969, and in connection with his duties as business agent for the firms of Schwartzbaum Furs and Chateau Creations, Glasser had made a total of six to ten cash pay-

---

* Defendants' assertion—in purported explanation of the union's utter non-action—that there was "a complete lack of evidence of contracting" is frivolous (SG Br., pp. 24-25). In addition to Glasser, Ginsberg testified that he had paid $1,000 for the privilege of making extensive use of his contractors Royal Fashion and Waxman. The names of the latter two firms occur with abundant frequency on the document generated by the union after its book analysis (GX 15). The union knew that Waxman and Royal Fashion were contractors (A 353a, 421a)—and about the latter Gold specifically so testified (A 484a). From that alone, the union necessarily knew that GX 15 represented a mass of contracting work and not jobbing since, by definition, a contractor is financially incapable of purchasing skins and manufacturing ready made garments and then selling the same to a union manufacturer. Defendants' assertion (SG Br., p. 24) that Reiss, an Association employee and government witness, testified that the union examination and GX 15 reflected only jobbing, with the exception of one instance of contracting, is false. After identifying the instance of Chaiken contracting Ginsberg had admitted, Reiss was unable to say whether the other entries on GX 15 were for contracting or not (A 207a). Moreover, Reiss' statement that, in his judgment, if prosecuted, Ginsberg would have received only a warning was directed only to the single charge which Ginsberg had admitted on the date of the book examination, to wit, employing Irving Chaiken to do $179 worth of finishing contracting and not to the more than $22,000 worth of contracting reflected on the face of GX 15 and 12 (A 201a-202a).

ments to him, each of $50 or more, in return for his agreement to ignore the violations by those two firms of the agreement's provisions against contracting (A 335a-339a).

On cross examination, defendants sought to establish that Jaffee's testimony was false and that it was the product of a desire to wreak revenge on Stofsky—who allegedly, after hearing of rumors that Jaffee had accepted money from a small shop owner, had acted to bar him from obtaining a job with another trade organization and had directed his transfer to another less desirable district.* In contrast, Jaffee testified that at age 66 he had not sought that job but had been solicited for it (A 340a-341a) and that, while he had not been given the job, he knew of no efforts by Stofsky or others to prevent him from getting it (A 341a-342a).

III. Glasser departs; the federal investigation and its obstruction

In August 1970 Glasser became ill, was hospitalized and later operated on. In his absence, Sherman fired a union floor boy whom he had used to carry work to and from his contractors (A 138a-139a). When the floor boy later confronted union officials with the indisputable fact of Sherman's contracting, Sherman turned to another Association labor adjustor, telling the latter of his payoffs arranged through Glasser (A 141a).

That information reached Association officials J. George Greenberg and Irwin Hecht who confronted Glasser, demanding to know the names of the union officials

---

* Stofsky's trial testimony was flatly contradicted by his earlier grand jury testimony of March 9, 1972, in which he denied he had ever heard of any payoffs being made from manufacturers to any representative of the union (A 430a; GX 59 *id.*, p. 37).

Glasser had paid, advising him his pension was in jeopardy and offering him $15,000 if he supplied the information requested (A 89a-90a, 171a-172a). Glasser denied he had received payoffs or passed any on to any union official. Subsequently he was fired and denied his Association pension (A 91a).

Later Glasser advised Hoff he needed an attorney to help him obtain that pension, and that Hoff and the others should provide that attorney for him. Within a day, Hoff arranged to meet Glasser and took him to see an attorney named Irving Anolik, who agreed to take the case for $2,000. Anolik's efforts were unavailing, and Glasser never received the pension. Glasser, who paid no part of Anolik's fee, was later told by Hoff that he had paid Anolik on two separate occasions (A 91a-94a).*

In February or March 1972, Glasser was asked to meet with a Detective Civitano. Alarmed by the request, Glasser called Hoff, who told him of the existence of the government investigation of the fur industry, being conducted by the New York Joint Strike Force ("Strike Force") and suggested they meet to discuss it (A 95a-97a). The next day Glasser conferred with Stofsky, Hoff and Gold at the Hotel New Yorker in Manhattan. There they counseled Glasser to meet with Civitano, find out what he knew and was looking for and report back to them (A 97a-98a). Glasser did as suggested and the day thereafter met again with Stofsky, Hoff and Gold—this time at the New York Hilton—where he related to them his conversation with Civitano. All concluded the latter was on a fishing expedition and knew nothing (A 99a-100a).**

---

* For Anolik's testimony largely corroborating Glasser's, see A 208a-213a.

** In his inquiry Civitano had asked in passing whether Glasser had ever had any problems with the Internal Revenue Service regarding his income taxes. Glasser replied he had not (A 331a-332a).

A few weeks later, at Civitano's further request, Glasser arranged to meet on April 4, 1972 with Gerard Hinckley—the attorney in charge of the Strike Force investigation of the industry (A 100-101a). Newly alarmed, Glasser telephoned Stofsky at his home in Dobbs Ferry, and they agreed to meet the next day, a Saturday in late March 1972, at the Hotel New Yorker (Tr. 278). At that meeting, Glasser told Stofsky of his impending meeting with Hinckley; that he, Glasser, would not be a "patsy" and would not alone shoulder the blame for the scheme of payoffs described above (Tr. 279). Stofsky insisted the government knew nothing and urged Glasser to say nothing, promising to expedite Glasser's receipt of his upcoming industry pension (Tr. 279).*

On April 4, Glasser met with Hinckley who, by his questions, implied his knowledge of the above-described payoffs. Glasser asked if immunity could be granted if he agreed to tell all he knew. Hinckley said it could and the meeting ended with Hinckley serving Glasser with a subpoena requiring the latter's presence before a grand jury on April 6, 1972 (Tr. 280; A 103a; GX 9).

---

* Glasser had applied for the pension provided by the industry Retirement Fund on March 16, 1971 (Tr. 1428), prior to his 65th birthday on May 21, 1971 (A 153a). He had requested that the usual delay of what was to be approximately one year in the commencement of the pension payments be waived. As of April 4, 1972, no waiver had been granted and Glasser had yet to receive any payments from the fund. Although Glasser had received a pro forma notice in October 1971 stating his pension had been approved (A 459a; GX 8), Glasser believed that Greenberg, his former boss who had fired him, was still a trustee of the Fund and, therefore, that the receipt of his pension was still in jeopardy (A 151a-152a). According to testimony elicited by the defense, Greenberg apparently had retired from that position in the summer of 1971, after Glasser had left the market. Not surprisingly, Glasser was unaware of any such supposed retirement, particularly since the letter of October 5, 1971 announcing the pension's approval showed Greenberg's name as a Trustee (A 152a; GX 8).

That evening Glasser telephoned Stofsky and advised him that he had been subpoenaed to appear before a federal grand jury in a few days. Stofsky requested that Glasser meet him in Manhattan. At Glasser's insistence they agreed to meet at approximately 6 p.m. at Tiffy's Luncheonette, near Glasser's residence in Queens (Tr. 281-282). When Stofsky arrived with Gold, Glasser showed them the subpoena, told them he needed a lawyer and that they ought to get him one, reiterated that he did not intend to take the "rap" for the whole payoff scheme (Tr. 283-284) and apparently told them he had been offered immunity (A 148a). Stofsky directed Gold to call the union's attorney, Harold Cammer (Tr. 284). Gold went to the telephone and when he returned told Glasser they had obtained a lawyer named Hammer, that Glasser would have to pay for him initially but that they would reimburse him (Tr. 284).* When Glasser continued to protest he would not be the "patsy", Stofsky told him "not to tell [them] anything, to take the Fifth" (*id.*), remarking that he would facilitate Glasser's recepit of his industry pension (Tr. 284; A 148a-151a).**

---

* Harold Cammer, the union's general counsel for 35 years, testified for the government that he had indeed received such a call from Gold at his Manhattan home at approximately 7 p.m., and had recommended an atorney named Arthur Hammer to represent Glasser (A 324a-326a).

** Defendants' assertion (SG Br., p. 15) that Glasser testified he did not receive his industry pension until one year after his meeting with Stofsky at Tiffy's, *i.e.*, until April 1973, and thereby perjured himself, is a distortion of the record and false. Glasser testified unambiguously that he began receiving that pension in April or May 1972 (A 152a-153a). The portion of his testimony wherein he said he began receiving that pension "[a]bout a year later" (Tr. 286) apparently contemplated as its antecedent reference his original filing for the same in March 1971. Further, defendants' assertion that by April 1, 1972

[Footnote continued on following page]

During that same highly charged meeting, Stofsky told Glasser that "Holman [sic] [recent head of the Strike Force] is now out of the picture and things should go a little easier from now on" (Tr. 285).

Later that night Glasser became ill and was hospitalized. Subsequently, through Hammer's efforts, Glasser's grand jury appearance was adjourned (Tr. 283-284, 286-288). When Glasser recovered, he received transactional immunity and testified in the grand jury to the material elements of the foregoing (Tr. 288-289).

IV. Walter Stiel payoffs (Counts 1, 16, 17 and 23)

Walter Stiel, a German refugee, testified that from 1964 through 1971 he and Martin Stern * were co-owners of Walt Stiel, Inc., a union manufacturer of sport and ski furs located on 29th Street.

In the latter part of 1967, Stiel's firm paid a one-man union shop, operated by Victor Lust, to perform a small amount of labor for it and purchased from Lust's shop a number of rabbit items (A 214a-215a; GX 16). The union, which found the name of Stiel's firm in Lust's books (A 228a-229a), responded by filing complaints for contracting against Stiel's firm (GX 16, 17, 18). In November 1968 Lust advised Stiel that as a result of having labored for Stiel's firm, he had been required to pay a fine of $750 after the union had threatened to

---

Glasser had already received the first payment from that pension is wholly unsupported by the record. Glasser's testimony is to the contrary and the clear import of the testimony of Florence Levy is only that the pension payments began effective April 1, 1972 and not that any such payment had been mailed on that date or at any time that month, much less that Glasser had received any such payment prior to the Tiffy's meeting on April 4, 1972 (Tr. 1433).

* At the time of trial Stern resided in Europe (Tr. 629).

close his shop if he did not do so within 24 hours (A 215a-216a, 234a). Stiel, whose shop was roughly four times the size of Lust's, feared he might be required to pay a fine of $3,000 in the absence of some other resolution (A 235a-236a).

Thereafter Stiel approached Gold in the street and asked if the charges against his firm could be settled peacefully. Gold said he would let him know. A week or two later Gold advised Stiel it would cost him $750 (A 216a-218a). Gold agreed to allow Stiel to make the pay-offs in installments.

With money Stiel and his partner saved from their wages, Stiel paid Gold in cash $350 on December 21, 1968 and $400 in January 1969 (A 216a-218a; GX 24). He recorded the serial numbers of the $400 in currency paid to Gold in December on a calendar page marked March 20, 1969. The latter had been taken from a calendar for the coming year which the firm had received that Christmas season from a bank and had elected to use as scrap paper (A 219a-221a).

None of the four complaints for contracting filed against Stiel's firm during that period was ever prosecuted (A 221a-222a; GX 16-19).*

---

* Defendants' suggestion (SG Br., pp. 29-30) that the first three union complaints (GX 16-18) charged Stiel's firm with "jobbing" violations is frivolous. The union business agent who filed the same clearly knew the difference between "jobbing" and contracting; and he charged Stiel's firm not only with a general pattern of contracting to Lust and others (GX 16), but also with a specific instance of $85 worth of labor performed by Lust for Stiel. Indeed, the business agent had brandished Lust's labor bill for $85 in Stiel's presence (A 228a). Moreover, the pertinent agreement, in dealing with con-

[Footnote continued on following page]

V. Daniel Grossman payoffs (Counts 1-5, 23, 25-26, 32 and 33)

A. Grossman's testimony

Beginning in 1948 and for the next 25 years, Daniel Grossman, age 48, directed the operations of a succession of Manhattan-based manufacturers of fur garments, of which he was the sole or co-owner (Tr. 649-652).

In 1953 Grossman's non-union firm, Harry and Dan Grossman Furs, Inc., which till then had functioned as a wholesaler and jobber, began giving out the manufacture of garments to contractors. Considerable union harassment followed and as a consequence in 1959 Grossman agreed to form an additional corporation, H & D Grossman Corp.—a union manufacturer employing from four to six workers—which signed an independent agreement with the union and began operations in 1960 (A 240a-242a). Both of Grossman's corporations thereafter occupied the same premises (A 242a) until 1971 when

---

tracting violations, provided that no union manufacturer could give out work to another union manufacturer in the absence of prior union approval and a host of other conditions rarely if ever met (GX 1, pp. 28-39). There can be no dispute that Stiel's firm had not met even one, much less all, of these conditions precedent. Moreover, defendants never called the pertinent union business agent to testify to the supposed "jobbing" violations.

With regard to the fourth and final union complaint of December 3, 1968 (GX 19), counsel for defendants below, in a moment of desperation, tried to suggest by his cross-examination of Stiel that his alleged contracting violation unrelated to the Lust charge was never prosecuted because the *Association* declined to press it (Tr. 587). Recognizing the absurdity of that stance, Hoff later blithely asserted, without reference to any basis for his supposed knowledge, that the union possessed insufficient evidence to prosecute that complaint (A 592a-593a).

Grossman sold his interests therein to Richton International. From 1960 through 1971, from those premises, Grossman's non-union firm, Harry and Dan Grossman Furs, Inc., was continuously engaged in the practice of giving out work to contractors which accounted for approximately 50 to 70 per cent of the total production of the two firms. The non-union firm employed no mechanics whatever but, through contractors, was responsible each year for approximately $2,000,000 worth of production; in that same span its co-tenant union firm produced yearly only $350,000 worth of garments (A 243a-245a).

These continuing and large scale violations of the contracting provisions did not go unnoticed. From 1960 through 1964 Grossman's premises were regularly picketed and struck by the union, and for such violations Grossman was fined $4,000 in 1964 (A 244a).

Faced with the foregoing, Grossman began in 1964 to make payments to Harry Koch, an industry shylock with union connections, to enable his non-union firm to continue to give out contracting without union harassment (A 312a-315a). Grossman paid Koch approximately $24,000 a year, from 1964 through the beginning of 1970 (A 290a-292a).* During that period, and in contrast to the pre-payoff period, Grossman experienced a

---

* Contrary to defendants' suggestion (SG Br., p. 33 n.*), the government had sought to elicit Grossman's testimony of his payments to, and conversations with, Koch in its direct case as probative of the formation and operation of the conspiracy charged in Count One. Defendants objected and the trial court declined to permit the government to do so (Tr. 632-644; Ct. Ex. 3). The bulk of that proffered testimony was subsequently elicited on cross and redirect examination.

virtual absence of union attention to his contracting violations.*

Early in 1970, Koch became ill and telephoned Grossman, telling the latter to make that year's first payment of $7,500 to David Koster—a non-union contractor and friend of Stofsky (A 289a, 248a), and that Koster would take care of any problems in Koch's absence. Grossman did as directed. Thereafter Koch died.

A short while later Grossman arranged a luncheon meeting with Stofsky at which he told him he had been paying Koch $12,000 a year over a period of years and that he had not had any union problems and wanted to continue to pay for that privilege. Stofsky called Koch the last of a certain breed of gangster, acknowledged having known him and having attended his funeral. Stofsky asked Grossman what he thought of Koster and later urged Grossman to give more of his contracting to Koster (A 246a-248a).

A few weeks later Gold visited Grossman at his shop and told him:

> "Look, we know what you have been doing all this time. We know who [you] give out work to.

---

* In 1966 a contracting complaint was filed against H & D Grossman Corp. and never porsecuted (A 258a; GX 62). In 1967 a contracting complaint was filed and no action taken until almost two years later in 1969 when—at a time Grossman's firms were producing $2,000,000 worth of garments in violation of the agreement's contracting provisions—it was settled with the payment of a $150 fine, which Stofsky conceded was "a very small fine" (A 385a, 547a). Though the union was aware Grossman was "one of the most outrageous violators of the contracting caluse" (A 481a), it undertook no examination of Grossman's books in connection with either complaint (A 258a, 313a-314a). Those books were replete with evidence of massive contracting (GX 37, 38) and the names of 15 to 20 of Grossman's contractors (A 251a-252a).

> You don't think you have been getting by with us on the arm. You know, this money went in various directions" (A 248a).

To test Gold's authority to speak for others, Grossman asked him to name the figure in mind. Gold replied "15,000", which Grossman said was wrong. Gold laughed and named the correct figure of $12,000. Remarking that $12,000 in cash was a lot of money, Grossman asked Gold if the sum could be spread out over three or four payments. Gold demurred, saying that that would be too dangerous. He said:

> "There are fellows who give it to us once a year and they get it over with" (A 249a).

When Grossman asked if he could make the payoffs through an intermediary rather than directly to a union official, Gold replied—"If you want to pay double" (A 250a).

It was then agreed Grossman would make two payments to Gold of $6,000 each. At the end of the meeting Grossman asked for further assurance Gold was not speaking only for himself, suggesting a telephone call in round-about terms confirming the arrangement. In a telephone call shortly thereafter, Stofsky told Grossman "[y]ou can go along with whatever Al Gold tells you and you were perfectly right in asking for me to confirm" (A 249a). Thereafter, in April and September of 1970, Grossman made payments to Gold of $6,000 in cash (A 250a-251a).

Early in 1971 Grossman concluded a profitable sale of his firm's assets to Richton International. Rumors abounded in the market and in February or March 1971, he related to Stofsky the facts of the sale—including his continuing control of the company—and tried to assure Stofsky that he could continue to make the payoffs without jeopardy to any of them. Stofsky said he would have

to think about it (A 253a-254a). At a second meeting attended also by Gold, the latter said he could see nothing wrong with going ahead with the deal. Stofsky was more hesitant, remarking that people go to jail for not being careful (A 254a-255a). By the conclusion of the meeting all present agreed to continue the payoffs (A 255a). In April and September of 1971, Grossman again paid Gold $6,000 in cash (A 255a-256a).*

In November or December 1971, at a meeting requested and attended by Hoff, the business agent for Grossman's firm since 1965, Stofsky told Grossman that his competitors were complaining to the union that

---

* The cash paid to Gold was part of a larger sum of approximately $80,000 Grossman had obtained from skin dealers in each of those years, with the remainder being used to make payoffs to buyers of Grossman's firms' merchandise (A 256a-257a). The source of cash in 1970 was Murray Orenstein (GX 32-35; DX O) and in 1971 Scheflin-Reich, Inc. (A 257a; DX P). In 1971, for instance, at various times during their regular course of business, Grossman notified Scheflin-Reich, Inc. of his firm's need for cash. That dealer than inflated by $1 or $2 above normal the price of each skin sold in the next transaction with Grossman's firm. The latter would pay that inflated price by check and thereafter receive the skins and $1 or $2 in cash for each skin purchased, less a small percentage as a commission to the skin dealer. In addition to the foregoing, Grossman's firm made scores of wholly bona fide purchases during each of 1970 and 1971. From Grossman during trial defendants sought, and received, those documents which reflected the transactions resulting in the receipt of cash by Grossman as described above (A 277a-279a; DX O, P); no request was made for documents pertaining to wholly bona fide purchases. The document pre-marked for trial as "GX 29 *id.*", but never used, identified or received in evidence at trial, reflects one such genuine transaction and, as such, was neither sought by the defendants nor required to be produced by the government pursuant to any *Brady* obligation. Defendants' claim otherwise (SG Br., p. 34 n.* and p. 43 n.*) is frivolous.

Grossman was contracting on a huge scale, running a small shop and producing a great deal of merchandise (A 261a).* Stofsky asked Grossman to consider having one or more of his contractors become union shops and further advised him that there might come a time when they would notify him to cease temporarily his use of contractors because of something the union might do (A 258a-261a).**

Thereafter early in 1972, Hoff and Stofsky advised Grossman that they were under great pressure as a result of the government's grand jury investigation, that it was absolutely necessary for Grossman to add 20 union employees to his factory, and that he could do so by taking in the entire shop of one of his contractors and they would give them union books. Grossman said he would have to confer with Frank Ricciardi, head of Richton, about any such move (A 263a-264a).

Thereafter Gold advised Grossman that Greenberg of the Association had appeared before a federal grand jury and had identified Grossman and another major manufacturer as having had special arrangements with the union (A 264a). In May 1972 Grossman added to his union factory the 12-man shop of his erstwhile principal contractor, William Poulos. Each was made a union member (A 265a).

---

* Earlier in 1971, Gold had advised Grossman that some union agents had pushed their way into the shop of one of Grossman's contractors, Sam Poulis, had found evidence in Poulis' books that Grossman was his major account, and had been told that fact by Poulis. Gold advised Grossman to get rid of Poulis or at least to instruct him to keep his mouth shut (A 260a).

** This apparently was a reference to the alleged subsequent acts of extortion aimed at closing down the contractors, which became the subject of Indictment 73 Cr. 615. See, *supra*, p. 2 n.*

During the period of the payoffs to Gold, and notwithstanding its massive contracting, Grossman's firm was neither fined, picketed nor struck (A 258a). Within weeks after the filing of the original indictment herein, 73 Cr. 257, which prominently displayed Grossman's name as the alleged source of $24,000 in payoffs,* the union filed a contracting complaint against Grossman which was vigorously prosecuted and which resulted in the imposition of a $10,000 fine by the union (A 265a-267a, 385a, 417a; GX 36).

B. William Poulos' testimony

William Poulos' Manhattan shop served as Grossman's principal contractor for approximately 17 years (A 315a-316a). During the season Grossman's employees made daily deliveries of skins and patterns to Poulos' shop (Tr. 913-915), from which the latter produced about nine to twelve coats a week (Tr. 932). These coats were delivered to another contractor who would then "finish" and deliver them to Grossman's shop (Tr. 912). For the foregoing, Poulos billed Grossman approximately $125,000 a year, which was paid by check (A 315a-316a).

On two or three occasions each year from 1965 to 1972, Gold visited Poulos' factory and inspected the seals affixed to the heads of skins on the premises, which included those from Grossman (GX 43), but asked no questions about them (A 317a-318a).

In June 1972, at Grossman's request, Poulos' entire shop of 11 men joined Grossman's factory and were given union books (A 319a).

---

* Grossman testified before the grand jury in July and October 1972 to the material elements of his criminal arrangement with Stofsky, Gold and Hoff (A 264a-265a). Defendants' assertion (SG Br., p. 34 n.**) that Grossman conceded he could have been prosecuted but for his testimony of payoffs to Gold is utterly false and belied by their own record references.

The Defense Case

Each of the defendants testified and denied that he had ever received payoffs from union manufacturers, either directly or through an intermediary such as Jack Glasser, Harry Koch or David Koster.

Confronted on cross examination with the fact that the union had completely failed to prosecute contracting violations, or had imposed only the most lenient of sanctions to proven instances of the same, the defendants offered the palpably incredible explanation—at once inconsistent with their earlier testimony—that such treatment was the product of the union's inability to detect or successfully to prosecute such violations because of its inadequate staff and information (A 400a-401a, 461a).

With respect to Grossman's firm, for instance, Stofsky and Hoff had testified that it was only because of intense union pressure, in the form of strikes, pickets and otherwise, that Grossman in 1959 had commenced a union operation in the first place, and that when thereafter from 1959 through 1964 Grossman continued to give out huge amounts of contracting, the union went up to his shop "continuously" forcing him to add additional workers to his factory and fining him $4,000 (A 366a, 514a-515a). Remarkably, while several of the defendants conceded they knew Grossman to be an "outrageous violator" of the contracting provisions continuously thereafter (A 373a, 481a), they acknowledged that from 1965—shortly after Grossman began making payoffs to Koch for labor peace and Hoff was appointed Grossman's business agent *—through 1972, little or no union action was taken

* Hoff and Stofsky testified that Hoff served as business agents for only three other shops, all of which had yearly sales volumes substantially greater than $1,000,000 and required "special attention" (A 405a-406a, 492a-493a, 513a). Notwithstanding this, Hoff testified he had "no idea" of Grossman's yearly volume of sales from 1965 to 1971 (A 538a).

against Grossman. There were no strikes or pickets; Gold was never directed by Stofsky or Hoff to focus on Grossman or any of his contractors (A 404a-405a, 482a, 526a, 537a);* the union made virtually no effort to "catch" any of the dozens of garments delivered each week to Grossman's premises by his contractors or any of the daily deliveries of skins and patterns to the latter by Grossman's employees and made no effort to gain evidence of Grossman's violations from any of his union employees who, necessarily, knew what was happening. While, contrary to Grossman's testimony, Stofsky and Hoff claimed that certain union representatives—whom they never identified—conducted book examinations of Grossman's firm (A 372a, 521a), they never offered the testimony of any such individual or documentary evidence to support their claim.

Generally, the defendants denied having met and conversed with any of the government's witnesses in the fashion evidenced in the government's case, except where that meeting or conversation had been corroborated by some concededly non-culpable third party. Thus, for example, Hoff admitted that in 1970 and 1971, after Glasser's firing, he had taken him to an attorney named Irving Anolik in an effort to help Glasser secure his Association pension (A 508a-512a).**

---

* While the defendants asserted they conducted strikes against contractors every day of the week and that the latter justifiably feared such action (Tr. 1299, 1466), none apparently was ever specifically aimed at any of the contractors laboring for any of the manufacturers who made payoffs.

** Hoff sought to explain that curious conduct by asserting that Glasser had threatened to reveal that Hoff had periodically received from him over the course of three years portions of a diary belonging to Hecht of the Association—for which Hoff had paid Glasser, including the cost of photocopying. Glasser had unequivocally denied any such conduct (A 145a) and Hoff

[Footnote continued on following page]

Similarly, Stofsky and Gold admitted they had met with Glasser at Tiffy's in April 1972 on short notice—a meeting corroborated by Cammer, the union's general counsel. Assertedly Glasser there had told them of his meeting earlier that day with Hinckley of the Strike Force, that Hinckley knew he had been fired for taking money from manufacturers, that he had big problems about income taxes, and that he had been summoned to appear again, needed a lawyer very badly and asked their help in getting one (A 394a-395a, 467a-468a). Stofsky admitted he had directed Gold to telephone Cammer and that as a consequence Hammer had been obtained to represent Glasser, but he and Gold denied they had exhorted or cajoled Glasser in any manner.

Neither Stofsky nor Gold, however, attempted to explain why he had assisted Glasser—a man with whom each said he had had only limited contact from 1955 to his firing in 1970 and had not seen since (A 361a-362a, 389a, 393a, 472a), and one whom each had reason to believe had received money from manufacturers who had violated the agreement's anti-contracting provisions. Moreover, neither sought to explain why he had never bothered to ask Glasser at Tiffy's whether he had received such payoffs and, if so, whether he had ever shared them with any union official (A 396a-398a, 476a). Finally, all conceded there had been no union investigation of any alleged union complicity in the payoffs to Glasser, but neither Stofsky, Hoff, Gold nor Lageoles offered to explain why.

---

was unable to explain why he had paid Glasser for papers of no apparent utility which, upon receipt, he had stuffed into a file cabinet where they had remained until trial (Tr. 1546-1550; A 506a-507a). Steadfastly maintaining he had paid Glasser for the photocopying expenses, although evidencing some confusion about the source of those funds (A 569a, 583a-584a), Hoff asserted Glasser had not demanded he pay Anolik's fee and that he had not done so, even though Glasser in allegedly threatening Hoff had told him he was without funds to pay for an attorney (A 574a-575a, 577a).

ARGUMENT

POINT I

The District Court properly denied defendants' first and second motions for a new trial.

Defendants claim that the District Court erred in two principal respects in denying their motions for a new trial: first, in finding that the government's conduct of the trial and related proceedings breached no obligations imposed by *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny; and second, in finding pursuant to an assertedly incorrect standard that the "newly discovered evidence" did not require the granting of a new trial. The claims are without merit. The trial court's finding that the government had violated no obligation imposed by *Brady* and its denial of the motions on the merits were correct and firmly grounded on the pertinent facts and law. Moreover, defendants' latter claim should be denied on the additional ground that the material asserted by them to be "newly discovered" could have been discovered at the trial had they exercised due diligence.

A. First new trial motion: prior proceedings.

On April 22, 1974, after trial, defendants filed a motion seeking a new trial on the ground of newly discovered evidence, specifically bank records from The East New York Savings Bank, The Greenwich Savings Bank and the Emigrant Savings Bank showing approximately $57,000 in cash deposits in Glasser's savings accounts during the

years 1967-1970.* Defendants claimed that those records established that Glasser had perjured himself at trial when he testified: (a) that he had given to defendants part of the money he had received from certain union fur manufacturers; (b) that most of the $120,000 he and his wife held in three savings accounts had come from his wife's inheritance (A 320a); (c) that from 1967-1970 he had received from the union manufacturers about $15,000 to $16,000, of which he had kept approximately $5,000 (A 167a); and that the portion of the moneys he had retained he had pocketed and spent, not banked (A 167a).

1. "The newly discovered evidence"

Trial commenced on February 11, 1974 and on that date, pursuant to a subpoena *duces tecum*, Glasser made available to defendants' counsel a copy of his 1972 federal joint income tax return (DX H) which declared $6,151 in interest payments from several savings banks.** Glasser

---

* Those records showed the following deposits in Glasser's savings accounts for the years 1967-1970:

	1967	1968	1969	1970	Total
Cash Deposits	$11,151.05	10,950.00	22,500.00	9,650.00	54,251.05
Check Deposits	$ 1,851.10	942.27	1,318.26	163.80	4,275.43
Cash or Check Deposits	$ 50.00	3,000.00	82.57		3,132.57
	$13,052.15	14,892.27	23,900.83	9,813.80	61,659.05

** The subpoena also sought the production of certain of Glasser's bank documents and federal income tax returns for 1967-1971, all of which Glasser testified he no longer had, having discarded them when he moved from New York to Florida in 1973 (A 164a). Defendants had not moved for the pre-trial production of any of Glasser's tax returns (A 802a), nor had they made a request for the same under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

was called to testify on February 13 (February 12 was a holiday), and his testimony continued through February 14. Mrs. Glasser testified as a government witness on February 15.

On February 14, defendants' counsel cross-examined Glasser concerning the source of the $120,000 in deposits at the three savings banks indicated on Glasser's 1972 return, which had given rise to the interest payments reported thereon. Glasser testified that most of that $120,000 had been inherited by his wife and had been deposited in savings accounts a long time ago (A 163a, 165a-166a, 329a); and that from 1967-1969 he had received from the union manufacturers a total of approximately $15,000 to $16,000, of which he had kept approximately $5,000 (A 167a). In her testimony the next day, Mrs. Glasser affirmed that in 1940, at her father's death, she had inherited approximately $60,000; and that in 1944, at her mother's death, she had inherited an additional $30,000 to $40,000; and that, accordingly, she and Mr. Glasser had $100,000 in savings accounts as early as 1945 (A 181a).

a. The East New York Savings Bank

On February 13, 1974 defendants' counsel served a subpoena *duces tecum* on The East New York Savings Bank calling for the production on February 14, 1974 of records pertaining to the Glassers' accounts from 1967 through 1972. The transcript of the Glassers' accounts at The East New York Savings Bank was delivered to defendants' counsel on or about February 20—six days before the close of defendants' case—and was available to them on February 14—twelve days before the close of defendants' case—had they asked for it.* The de-

* The transcript actually had been delivered to the trial courtroom on February 14 by an officer of The East New York Savings Bank but, as a result of inadvertence, had not been surrendered at that time (A 757a-758a).

posit and withdrawal tickets from 1967 through 1970, whose production was not specifically commanded by the subpoena served by defendants' counsel, were mailed to defendants' attorneys on March 6, 1974 (A 752a-758a).

The transcript received by defendants' attorney on February 20 * showed that the Glassers had deposited $38,156.97 in savings accounts at The East New York Savings Bank during the years 1967-1970. Glasser was recalled by the government and vigorously cross examined by defendants' counsel on the basis of his tax returns for 1967 through 1971 supplied that day by the government to defendants' counsel (Tr. 956). Although the principal thrust of that examination sought to establish that Glasser had pocketed entirely any and all payoffs he had ever received from manufacturers, defendants' counsel made no use of the transcript that day and never sought thereafter to have Glasser recalled for further cross examination (A 328a-332a). Moreover, defendants' counsel did not offer this transcript in evidence on defendants' own case to impeach the testimony of the Glassers concerning the source of the funds in their savings accounts. Defendants' counsel did choose to introduce at trial for this purpose probate records of the estates of Mrs. Glasser's parents (A 601a-602a; DXs AM, AN), indicating that she had received from the estates of her father and mother approximately $1,200 and $1,600, respectively.

Subsequent to trial, defendants' counsel asserted for the first time (A 701a-702a, 769a-770a), and repeat here, that they had declined to use that transcript at trial be-

---

* Defendants' papers below first asserted that they had received the transcript on February 20 but, after the government had filed its answering papers, defendants asserted the correct date was February 21 (A 701a, 769a).

cause, in the absence of the deposit tickets evidencing the cash or non-cash character of the $38,000 of deposits, most of which were in round sums, they lacked a good faith basis for doing so. At no time, however, did the defense bring to the trial court's attention, in the form of a request for continuance or otherwise, its supposedly then felt need for the deposit tickets for the years 1967-1970 as a condition precedent for the use of the transcript.

b. The Greenwich Savings Bank and the Emigrant Savings Bank

Since Glasser had discarded his tax returns for the years prior to 1972 when he moved to Florida, he was not able to produce these returns on February 11 in response to defendants' subpoena. On February 15, 1974, on defendants' motion, the trial court ordered the government to produce copies of Glasser's returns for the prior years from the files of the Internal Revenue Service ("IRS"). While under normal procedures it would have required at least several weeks to obtain such returns (Tr. 444), through special efforts of the government, later commended by the court, and with Glasser's consent to disclosure of the returns, they were produced from IRS archives and made available to defendants' counsel on February 20—well before the close of defendants' case on February 26 (Tr. 956).

The returns showed additional interest payments from The Greenwich Savings Bank and the Emigrant Savings Bank during the years 1967-1970. Defendants' counsel made no attempt to subpoena records of those accounts until April 10, 1974, long after the jury had returned guilty verdicts against defendants. If defendants had subpoenaed the records on February 20, the day they received the income tax returns, both The Greenwich Savings Bank and Emigrant Savings Bank could have provided

records of the accounts, including copies of deposit tickets, within two to four business days (A 759a-762a).

The additional records which defendants' counsel subpoenaed on April 10, 1974, showed that during the years 1967-1970, the Glassers, in addition to the $38,156.97 deposited in The East New York Savings Bank, deposited $14,007.63 at The Greenwich Savings Bank and $9,494.45 at the Emigrant Savings Bank. Twelve thousand four hundred thirty dollars of the Greenwich deposits and $7,320 of the Emigrant deposits were in cash.

In sum, defendants asserted that while certain manufacturers may have made payoffs to Glasser for the purpose of obtaining the union's acquiescence to violations of the contracting and other provisions of the agreement, the foregoing "newly discovered evidence" of approximately $57,000 in cash deposits from 1967-1970 established that Glasser had kept all of the money so received and had passed none of it to defendants:

> "We submit that the source of these cash deposits can be explained only by concluding that Glasser perjured himself when he testified that he gave any of the monies to one or more of the defendants and when he said that the whole 'shooting match' was only $15,000 or $16,000. Rather, there were much larger payments and/or payments from many additional sources and no portion of any payments went to anyone other than Glasser himself. There is no other way to explain these huge cash deposits . . ." (A 703a).

Glasser was able to perpetrate this deception on the manufacturers, defendants argued, because he knew the union lacked sufficient staff to police those provisions of the agreement.

Defendants also grounded their new trial motion on the novel claim that the prosecution "possessed" Glasser's tax returns, on file in IRS archives, that under the circumstances the prosecutor should have recognized their high value to the defense and turned them over to defendants pursuant to the principles of *Brady;* and that in any event the government had an obligation to conduct a pretrial investigation of Glasser's finances.

2. The government's response

In response the government submitted affidavits of officials of The East New York Savings Bank (A 752a-758a), The Greenwich Savings Bank (A 759a-760a) and the Emigrant Savings Bank (A 761a-762a) stating, respectively (as set forth in greater detail at pp. 47-50, *supra*), that the records of The East New York Savings Bank on which defendants' motion was based were available on February 14, 1974, and the remainder prior to March 7, 1974; and that those of The Greenwich and Emigrant Savings Banks had been available on two to four days' notice if defendants had served a trial subpoena for them.

As a further part of its response, the government reinterviewed the Glassers on several occasions in May, 1974. In those interviews Glasser reaffirmed the truthfulness of his earlier testimony that he had paid to defendants portions of those monies he had received from various union fur manufacturers. When questioned about the source of the deposits in their bank accounts during the years 1967-1970, however, the Glassers informed the government for the first time that during those years they had received funds from a variety of sources totaling approximately $104,000. Of that total, Glasser stated that approximately $21,000 represented his share of additional illegal payoffs he had received from manufacturers

other than those mentioned at trial, a portion of each one of which he had passed to one or more union officials—almost invariably one or more of defendants herein—for the purpose of obtaining the union's acquiescence to violations of the agreement's provisions against contracting and other prohibited practices. The Glassers admitted that their testimony regarding the origins of the approximately $120,000 held in their savings accounts was false and that for the most part the $120,000 had not come from any inheritance of Mrs. Glasser and had not been deposited in their savings accounts as early as 1945. Glasser also admitted, contrary to his trial testimony, that some of the $5,000 he had retained from the payoffs he testified to at trial may have been deposited in a safe deposit box.

The Glassers' description of the sources of the approximately $104,000 in funds for the period 1967-1970, and their comments on their testimony at the trial herein, were recorded in the affidavit of an Assistant United States Attorney served on counsel and filed with the trial court in response to defendants' motion (A 742a-749a). In an additional affidavit of that Assistant United States Attorney, filed with the trial court but not served on counsel, further details provided by Glasser of the payments from the other manufacturers were set forth. The trial court granted the government's request that the additional affidavit be sealed and made a part of the record herein, on the ground that publication of the information contained therein might compromise further federal investigation of the fur industry and prematurely identify numerous other individuals who allegedly had violated federal criminal laws.

3. The District Court's decision

At defendants' sentencing on May 31, 1974, the District Court announced that it was denying defendants' motion for a new trial. In a Memorandum Opinion dated June 12, 1974 (A 792a-806a), the District Court found that Glasser "ha[d] engaged in an effort to conceal information, and ha[d] given false or deliberately misleading testimony with respect to the source of his savings" (A 798a). Noting that the issue of defendants' due diligence was a "close" one and that "it would appear that the key to the 'new' facts was in defense counsel's hands from the moment Glasser was cross-examined about his 1972 tax return early in the trial" (A 799a), the Court nonetheless declined to find "that trial counsel in a complex, demanding case is bound to turn every key at precisely the right moment in order to meet the requirements for a new trial motion" (A 799a). Turning to the merits the Court found that there had been no prosecutorial misconduct and that therefore the applicable test for evaluating the new evidence was whether it would "probably produce a different verdict in the event of a retrial" (A 802a). The Court then rejected defendants' argument that the bank records established that Glasser had committed perjury when he testified that he gave the defendants part of the money he received from the five manufacturers he previously identified:

> "It is far too wide a leap in reason to assert that just because Glasser accumulated $57,000 in cash during the critical time period that, *a fortiori*, a jury hearing these facts could only conclude that he kept the whole of the mere $11,000 he said he gave the defendants. On the contary, the figures alone are so incongruous as to lead to no conclusion at all" (A 803a).

The Court continued that even defendants had noted in their papers that the bank records would indicate to a jury that there were other or larger payments or both —indeed, the Court continued, given the explanation Glasser would likely give at another trial further implicating the union officials, it was unlikely that they would even use the bank records at another trial (A 803a-804a). Finding that the new evidence "would not have changed the quantum of the impeaching effect" and taking into account the "totally independent evidence to support Glasser's story which would have remained unsullied" the District Court stated that it could not conclude that in light of the new evidence the jury would probably have reached a different verdict at the completed trial or at a retrial (A 805a-806a).

B. Second new trial motion: prior proceedings

1. The government's production of additional financial records.

Following receipt of the papers in support of the original new trial motion in *Stofsky*, the government commenced an investigation of the allegations in those papers as well as a broader investigation of the fur manufacturing industry. In addition to the May interviews of Glasser discussed above, grand jury subpoenas were issued on May 9 and 19, 1974, for additional financial records of Glasser including subpoenas for records from Chemical Bank and the Dollar Savings Bank, as well as records from The East New York Savings, The Greenwich Savings Bank and the Emigrant Savings Bank which covered a broader time period than had been specified in the earlier subpoenas issued by the *Stofsky* defendants (AA 49). Production of the records specified in those subpoenas was incomplete by the return date fixed for the

first new trial motion and the documents which had been produced by that time did not contradict any statements in the papers submitted by the government in response to the first new trial motion (AA 47, 50). After consultation with the Chief Assistant United States Attorney, it was decided not to make a piecemeal production at that time of the incomplete financial records, but rather to pursue the investigation, obtain all the records available and then produce to defense counsel any documents which could even arguably provide any support for defendants' position (AA 50-51). During June through August, 1974, the government attempted to obtain all the remaining financial records which were available, particularly records from Chemical Bank (AA 51-52). All of the remaining Chemical Bank documents were finally produced on August 16, 1974 (AA 51). Following receipt and analysis of those documents, the government again interviewed Glasser in Miami, Florida, on August 23, 1974. Glasser's statements in that interview were inconsistent with his statements in the May, 1974 interview in two respects: first, he said that he had begun receiving payoffs from manufacturers in 1962, whereas he had earlier said that the payoffs had begun in 1964; and second, he estimated his wife's inheritance at $30,000 to $40,000 in value and could not specify what portion of that was included in his savings accounts, whereas he had estimated in the May interviews that $40,000 to $50,000 of the moneys in his savings accounts had come from his wife's inheritance (AA 52, 67-70). By a letter dated September 3, 1974,* the government informed defendants' counsel of those inconsistencies and further stated that all of Glasser's financial records obtained by the government in connection with the government's continuing investiga-

---

* Through a mistake in the United States Attorney's office the letter was not mailed until September 11, 1974 (AA 53).

tion of the fur industry were available for their inspection (AA 22-23, 53). The government then entered into stipulations with defendants staying the pending appeals to allow further new trial motions in the District Court (AA 25-28).

2. Defendants' second motion

Defendants then filed papers in support of their second motion for a new trial. The bank records made available by the government in September, 1974, together with the bank records which were the basis for the first motion, showed deposits by Glasser during the years 1962-1973 totaling $157,688.83 (AA 58-64). A breakdown of the deposits shown by the bank documents produced by the government in September, 1974, is attached hereto as an addendum.

In an affidavit submitted by counsel for defendants Stofsky and Gold, defendants asserted that the new evidence "wholly invalidated the basis for [the Distrcit Court's] denial of" the earlier new trial motion (AA 14):

> "Thus, while it is certainly true that Glasser's dealings with manufacturers were far broader than he previously admitted, the inference from this fact that the sums he passed to the defendants were larger than he previously testified . . . no longer is valid, even if, respectfully, it ever was" (AA 16-17).

The affidavit further asserted that a new trial was required in any event since the government had deliberately suppressed pertinent evidence received by it during the pendency of the first new trial motion (AA 9-10, 14-15). Finally, the affidavit alleged that a new trial was

required because the most recent information of Glasser's inconsistent statements supplied by the government established that Glasser had lied in connection with the first new trial motion.

3. The government's response

The government's affidavit in response rejected the allegations of prosecutorial misconduct and provided a detailed account of the investigation pursued by the government, including a government file memorandum of the interview with Glasser on August 23, 1974 (AA 49-53, 67-70).* The affidavit indicated that after receipt of defendants' first new trial motion papers based on the records of the three savings banks, the government launched an investigation of Glasser's finances that included subpoenaing records covering a broader time period from those institutions as well as records from other banks and brokerage houses (AA 22, 43-44, 48-53); that the government continued to press for the production of additional financial records after the District Court had denied defendants' first new trial motion; that after receipt of all the available financial records it conducted a further interview of Glasser in Miami, Florida on August 23, 1974; and that thereafter, *sua sponte*, it notified defendants' counsel that all the documents it had obtained were available for their review—even though on the whole those documents were consistent with Glasser's statements to the government in May 1974 (AA 47) and with an earlier income, expense and deposit analysis which had been performed by the government—and informed them about the subsequent interview with Glasser.

---

* Certain names as well as certain paragraphs concerning matters other than Glasser's finances were redacted from the Memorandum (AA 52).

4. The District Court's decision

The District Court denied defendants' second new trial motion in a Memorandum Opinion dated June 4, 1975 (AA 82-88). The Court concluded that although the government's decision not to disclose the additional bank records during the pendency of the first new trial motion "constituted an error in judgment" (AA 84), the defendants were in no way prejudiced, and accordingly denied that aspect of defendants' second new trial motion (AA 85). With respect to Glasser's personal finances, the District Court found that the additional bank records strongly reaffirmed the conclusion that Glasser had given false testimony with respect to the source of his savings, but that it added "nothing substantively different to what was presented in the first motion for a new trial" (AA 86).

C. The government violated no obligation imposed by *Brady* v. *Maryland*.

Defendants contend that the government violated obligations imposed on it by *Brady* v. *Maryland*, 373 U.S. 83 (1963), because it did not turn over to defendants before trial copies of Glasser's federal income tax returns for 1967 through 1972. They reason that since Glasser's federal tax returns were filed in IRS archives until their production at trial, they were possessed by the "government" throughout; that in the context of this case the government should have undertaken a reasonable investigation of these records in its possession; if it had it would have recognized their high value to the defense and been required to turn them over before trial; and defendants then could have secured by trial all the Glassers' bank records which formed the predicate for the new trial motions. For this novel thesis defendants cite no authority and we know of none. The trial court's finding

that there had been no prosecutorial misconduct was entirely correct.

First, defendants' contentions largely ignore the simple fact that they received Glasser's 1972 tax return on the first day of trial and the government provided the remainder of those in issue (for the years 1967-1971) on February 20. This afforded defendants ample time to obtain the records from the banks specified on those returns, had they chosen to do so. See, *supra*, pp. 46-50. *Cf. United States ex rel. Lucas* v. *Regan*, 503 F.2d 1, 3 n. 1 (2d Cir. 1974). Instead, defendants chose not to subpoena several of the banks whose interest payments were reported on those returns and whose records defendants now claim warrant a new trial; declined to make use of The East New York Savings Bank transcript showing nearly $40,000 in round-sum deposits during the pertinent years of 1967-1969; and uttered not a word to the trial court about the supposedly then felt need for additional time in which to obtain the then available records they now claim entitle them to a second bite at the apple.

Second, the trial court correctly found that the prosecution could not properly be said to have had constructive possession of Glasser's returns merely because they were on file with IRS (A 801a). To hold otherwise would be to say that knowledge possessed by any part of government is equivalent to knowledge on the part of the prosecution. This Court has expressly rejected that proposition as a *reductio ad absurdum*. *United States* v. *Quinn*, 445 F.2d 940, 943-44 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). *Quinn* refused to impute knowledge of a sealed indictment against a government witness filed in one federal district to a federal prosecutor in another; its teaching applies *a fortiori* to defendants' attempt here to impute to the prosecution information contained in tax returns on file with the IRS—an executive agency which is entirely dis-

tinct from the prosecution and the confidentiality of whose files is protected by law. See 26 U.S.C. § 6103(a) (A 801a). No court has extended such constructive knowledge nearly as far as defendants urge here.* Nor should this Court do so here. It is obvious, without extensive elaboration, that somewhere in one of the myriad agencies of the United States government, there is information about virtually every witness the government could ever call in any criminal trial. For example, there is presumably a file or record for every adult alive today in the IRS and the Social Security Administration. Every adult male in the population either has or should have had at one time a Selective Service file, and a large number will have files relating to prior military service. Were the prosecution required to procure and review such files wherever related to the broadly construed subject matter of the trial, the prompt prosecution of criminal cases

---

* The cases relied on by defendants are inapposite or readily distinguishable. *United States* v. *Miller*, 411 F.2d 825 (2d Cir. 1969) and *United States* v. *Consolidated Launderies Corp.*, 291 F.2d 563 (2d Cir. 1961) involved the government's failure to turn over information in the *actual* possession of the prosecution. No such claim is or could be made here. *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1964), involved the wilful or negligent suppression by the police, unknown to the prosecutor, of reports of ballistics and fingerprint tests which had been undertaken by the police in connection with *Barbee's* prosecution and which on their face rather clearly tended to exculpate him. In contrast, no one in the government machinery had any awareness that Glasser's testimony of the source of the money in his savings accounts was anything other than the "gospel". See *Luna* v. *Beto*, 395 F.2d 35, 41 (5th Cir. 1968) (concurring opinion), *cert. denied*, 394 U.S. 966 (1969). Moreover, Glasser's returns were neither prepared nor suppressed in contemplation of defendants' prosecution. They became germane only because of developments at trial and then to collateral issues only. They did not on their face openly contradict testimony of government witnesses as did the police reports in *Barbee*.

would be impossible. *Brady*, it is well to remember, involved a failure to turn over to the defendant a co-defendant's statement which was in the prosecutor's file, which had been the subject of a specific request of the defendant agreed to by the prosecutor, and which related directly to the crime charged and was plainly exculpatory of the defendant.*

Third, even if the prosecution had possessed Glasser's tax returns in its case file at the opening of trial, there would have been no *Brady* obligation to disclose them to the defense. The trial court so held, finding that their materiality was highly questionable (A 801a). Indeed, defendants never asked that the returns be produced before trial from the files of the IRS, being content instead to delay their production and risk their non-availability by requiring their production by a subpoena *duces tecum* served on Glasser and returnable at trial. Moreover, there was nothing in the returns themselves which would have "flagged" the prosecutor's attention. *Cf. United States* v. *Miller*, 411 F.2d 825 (2d Cir. 1969). Nothing about the fact that the Glassers, a couple in their mid-sixties, had a substantial sum of money in the bank which was wholly incongruous with the amounts in issue at trial was, without more, exculpatory of the defendants or impeaching of Glasser's testimony. The only relevance

---

* Defendants' reliance (2HL Br., p. 21 n.10) on *United States* v. *Deutsch*, 475 F.2d 55 (5th Cir. 1973), is misplaced. The Court there held only that the prosecution could not defeat a *specific pretrial request* under *Brady* for the Postal Service personnel file of a prospective government witness merely by asserting that the file was in the possession of the Postal Service —and not the prosecution—and that the former was not an arm of the latter. Here, of course, defendants made no pretrial requests under *Brady*, or any other authority, for Glasser's returns.

which the returns took on at the trial was that they suggested the existence of money in the Glassers' possession, the Glassers' testimony about the sources of which the defense was able to show to be false.*

Finally, although defendants cite no authority for the proposition that the government was required to audit Glasser's finances as they suggest,** it now seems clear

---

* The assertion of present appellate counsel for Hoff and Lageoles (2HL Br., p. 20 n.10) that the government was aware before trial of the alleged "crucial importance of the issue of the source of Glasser's wealth and of the obvious impact that Glasser's tax returns might have on that issue" is utterly baseless and false. Counsel purport to found such a governmental awareness on the alleged fact that the government was ready to call Mrs. Glasser solely on the question of the source of their savings immediately after Glasser's testimony. In truth, Mrs. Glasser was present in New York only because Glasser had a cardiac ailment which prevented him from traveling alone from Miami to New York (see Tr. 197). She was called by the government on the morning of February 15 (Tr. 441, 462) only because in the late afternoon of the preceding day defendants' trial counsel had extensively cross-examined Glasser about the source of the $120,000 he and his wife had in savings accounts (Tr. 405-428)—a subject about which till then there had been no questions and one which up until that time had played no role in the government's preparation or proof of its case.

** Defendants' assertion (SG Br., p. 44 n.***) that the Strike Force conducted "full audits" of the defendants is unsupported by the record and false. Moreover, contrary to defendants' suggestions (2HL Br., p. 21 n.10), IRS involvement in the investigation and prosecution of this case was quite limited. The indictment was the result not of an investigation conducted by the Intelligence Division of the IRS, but rather of an organized Crime Grand Jury investigation of corruption in the furriers' industry. IRS involvement in that grand jury investigation was limited principally to the tax evasion counts. In that connection, a revenue agent simply added up the payoffs allegedly received by the particular defendant for the year in

[Footnote continued on following page]

that had the government done so, Glasser's post-trial statements of defendants' further involvement in the course of criminal conduct of which they stand convicted would probably have been revealed at the earlier time and thus available to the government at the trial herein. How that can be said to redound to defendants' benefit is difficult to discern.

D. Due diligence by defendants would have discovered the evidence at trial.

It is axiomatic "that a defendant seeking a new trial under any theory must satisfy the court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or at the latest, at trial." *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). *Accord*, *United States* v. *Marquez*, 490 F.2d 1383 (2d Cir. 1974), *aff'g on opinion below*, 363 F. Supp. 802, 803 (S.D.N.Y. 1973), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Edwards*, 366 F.2d 853, 874 (2d Cir. 1966), *cert. denied*, 386 U.S. 919 (1967); *Brown* v. *United States*, 333 F.2d 723 (2d Cir. 1964).

Where the basis for the motion is an assertion that certain trial testimony was false, the party seeking the new trial must establish that he "was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." *Larrison* v. *United States*, 24 F.2d 82, 88 (7th

---

question, as set forth in the testimony of the several grand jury witnesses, added that sum to the figure for taxable income already reported on that defendant's return and recalculated the tax. See Affidavit of Robert R. Maroncelli, Revenue Agent, Audit Division, IRS, sworn to November 15, 1974 and submitted in opposition to defendants' second new trial motion (AA 5).

Cir. 1928). From the undisputed facts herein it seems clear that defendants failed to satisfy tha prerequisite.

In the instant case, the trial court found as a fact that:

> ". . . the key to the 'new' facts was in defense counsel's hands from the moment Glasser was cross-examined about his 1972 tax return early in the trial, or at the latest when counsel finally viewed the transcript of the East New York Savings Bank accounts on February 21, 1974, and saw that $38,000 (almost a third of what Glasser had earlier told him represented the total Glasser fortune) had been deposited in frequent transactions from 1967 through 1970" (A 799a).

Noting that the issue was a "close" one (A 799a), the Court nonetheless declined to find a failure of due diligence on the part of defense counsel. Instead, it held that:

> "trial counsel in a complex, demanding case is [not] bound to turn every key at precisely the right moment in order to meet the requirements for a new trial motion" (A 799a).

To correctly determined facts, the trial court applied, we respectfully submit, an erroneous standard of law. If the requirement of due diligence signifies anything, it must surely mean that defense counsel is required to make use of evidence in his actual possession, that he turn at the very least each such "key" that he has on hand—particularly where its pertinence could hardly escape attention. In the instant case counsel failed utterly to do so.

As this Court said in *United States* v. *Edwards*, *supra*, 366 F.2d at 873:

> "There was no satisfactory showing before the trial judge as to reasons why the supposed 'documentary proof' . . . could not have been brought to the Court's attention during trial by the exercise of due diligence."

The transcript of The East New York Savings Bank account was delivered to defendants' counsel six days before the close of defendants' case and was available to them twelve days before the close of defendants' case, had they asked for it. Copies of deposit tickets for those accounts showing the amount of cash deposits and the amount of deposists by check might also have been available prior to the close of trial had defendants sought with due diligence to obtain them. They were delivered at a later date, no doubt at least in part, because of the casual attitude displayed by defendants' counsel regarding their production and the lack of specificity of defendants' subpoena *duces tecum*. But, in any event, the argument proffered by defendants, both here and below, that the transcript could not be used by them in the absence of the deposit tickets is disingenuous and flies in the face of the trial court's finding that the transcript was "strong evidence that Glasser was not telling the truth with respect to [Mrs. Glasser's] inheritance" (A 799a).* Moreover, the

---

* Experienced trial counsel surely recognized that evidence of such frequently made deposits could be probative, indeed powerfully persuasive, of the falsity of the Glassers' testimony regarding the source of their savings accounts and that counsel's use of the same did not require as a condition precedent the elimination of all possible innocent explanations. Moreover, in these days of Watergate misadventures and laundered cash, it strains credulity to believe that experienced trial counsel could not perceive and articulate for the jury some possible nexus between cash payoffs and nearly $40,000 in what might at worse have been check deposits. In any event, it can hardly be doubted that if defense counsel had offered the transcript in evidence, the trial court would have been entirely correct in receiving it.

importance of the evidence of $38,000 of recent deposits in the savings account was substantially increased by the Glassers' testimony in the government's case that the money in this account came from inheritances received prior to 1945, an assertion that was additionally made suspect by the probate records that were put in evidence by the defense.

As to The Greenwich Savings Bank and the Emigrant Savings Bank, transcripts of the Glassers' accounts in those banks and copies of the deposit tickets which showed additional deposits during the years 1967 through 1970 were available on from two to four days notice to the banks. Since defendants learned of these accounts on February 20, they could have received these records beginning February 22—four days before the close of their case.*

In short, while defendants were then on notice of the falsity of the Glassers' testimony about the source of the money through the transcript of the account of The East New York Savings Bank and were able to meet this testimony through those records or the other bank records available to them, they chose not to use this material either as a basis for further examination of Glasser on recall or as exhibits in evidence to contradict his earlier testimony. Although the trial court declined to find that the non-use of the bank records in question by defendants' counsel was a conscious choice among competing trial

---

* There would have been no need for defendants to request a continuance of the trial in order to obtain the records. Of course, defendants' counsel had discussed with the court the possible need for a continuance to obtain Glasser's income tax returns (Tr. 454). No such request was made in connection with the bank records.

strategies (A 799a), it is noteworthy that defendants' counsel had successfully opposed any government attempts to elicit testimony regarding payments other than those specified in the indictment, had studiously avoided asking Glasser about payoffs from manufacturers other than those he had testified to on direct examination and made no use of a document surrendered to them by the government prior to Glasser's direct testimony, in compliance with *Brady*, which contained allegations that Glasser had received payoffs from a union fur manufacturer other than those he had testified about, and that Glasser had approached yet another furrier with a proposal concerning contracting which would have yielded money to Glasser (Tr. 59; Ct.Ex. 2). Such well considered caution on the part of defense counsel, fearing perhaps the revelation of additional crimes in which defendants were involved, though now unsuccessful, was not necessarily unwise.*

---

* By way of assessing the diligence of the defense conduct in this matter, it may be useful to compare it to the hypothetical situation where the above circumstances were the same except that it was the prosecution, not the defense, which possessed The East New York Savings Bank transcript during the trial. It can hardly be doubted that had the prosecution chosen during the trial to sit on that document, in the face of Glasser's testimony, on the ground that it had no "proof positive" that the round sum deposits were in cash, reversal would be mandated under *Brady*. While we recognize that defense counsel are sometimes held to less rigorous standards than the prosecution and that the purposes, and hence the scope, of the *Brady* and due diligence requirements are not coextensive, we respectfully submit that where, as here, defendants were represented below by a single defense team composed of several experienced lawyers, at least two of whom are former prosecutors, and where the evidence firmly suggests that the decision not to use the available bank records may have been a deliberate trial tactic, a finding that defense counsel did not exercise due diligence is fully warranted.

Where, as here, however, defendants declined at trial to make use of material that would have contradicted testimony they knew to be false, courts have consistently denied subsequent motions for a new trial premised on the false testimony, thereby denying defendants a second bite at the apple. *United States* v. *Costello*, *supra*, 255 F.2d at 879, citing with approval, *United States* v. *Flynn*, 130 F. Supp. 412 (S.D.N.Y.), *reargument denied*, 131 F. Supp. 742 (S.D.N.Y. 1955); *United States* v. *Capece*, 287 F.2d 537 (2d Cir.), *cert. denied*, 368 U.S. 847 (1961); *United States* v. *Becker*, 466 F.2d 886 (7th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

E. The trial court applied the correct legal standard in determining defendants' first and second new trial motions

"A motion for a new trial based on newly discovered evidence is addressed to the discretion of the trial court. *United States* v. *Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), [*cert. denied*, 402 U.S. 953 (1971)]; *United States* v. *Lombardozzi*, 343 F.2d 127, 128 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965); *Brown* v. *United States*, 333 F.2d 723, 724 (2d Cir. 1964). It is 'not favored and should be granted only with great caution,' *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958)...." *United States* v. *Sposato*, 446 F.2d 779, 781 (2d Cir. 1971). "The generally accepted criteria for granting a new trial on the ground of newly discovered evidence are (1) the evidence must have been discovered since the trial, (2) it must be material to the factual issues at the trial and not merely cumulative of evidence already introduced on impeaching the character or credit of a witness, and (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. *United States* v. *Polisi*, 416 F.2d 573, 576-

577 (2d Cir. 1969)." *United States* v. *De Sapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972). Although the importance of the newly discovered evidence need not be so great if the evidence was suppressed by the prosecutor, *United States* v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973), that standard is inapplicable here since it is plain, for the reasons stated in Part C, above, that defendants' *Brady* claim is without merit. Similarly, while the procuring or knowing use of perjured testimony by the government may require reversal regardless of the significance of that testimony, compare *Napue* v. *Illinois*, 360 U.S. 264 (1959) with *United States* v. *Mele*, 462 F.2d 918, 924 (2d Cir. 1972), this Circuit's strict new trial standard, quoted above, is not weakened if the perjured testimony by a government witness was not known by the prosecutor to be such when given. *United States* v. *Rosner*, 516 F.2d 269, 279 (2d Cir. 1975); *United States* v. *Marquez*, 490 F.2d 1383 (2d Cir. 1974), *aff'g on the opinion below*, 363 F. Supp. 802, 806 & n.15 (S.D.N.Y. 1973) (Weinfeld, J.); *United States* v. *De Sapio*, 435 F.2d 272, 286 n.14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). Here there is no allegation, nor could there be, that the prosecutor knew of the Glassers' false testimony about the origin of the money in their bank accounts. Accordingly, the trial court correctly applied the strict new trial standard appropriate in the absence of government misconduct.

Despite the settled state of the law in this Circuit, defendants spend considerable time attacking the trial court's determination of the standard (see, *e.g.*, 2HL Br., pp. 17-26). In doing so, they totally ignore the teaching of this Court's most recent decisions, *United States* v. *Rosner*, *supra*, and *United States* v. *Marquez*, *supra*, which confirms the correctness of the trial court's determination.

Curiously, defendants rely instead on *Mesarosh* v. *United States*, 352 U.S. 1 (1956). But this Court has said more than once that such reliance is misplaced. *Mesarosh* is "*sui generis*," *United States* v. *Zane*, 507 F.2d 346, 348 (2d Cir. 1974), *cert. denied*, — U.S. — (1975); and "that rare situation where a key witness who was accusing people of Communist affiliations had been conceded by the Government to have testified against others in a Senate investigation in such a bizarre fashion as to raise the inference that he was either an inveterate perjurer or a disordered mind." *United States* v. *Rosner*, *supra*, 516 F.2d at 279-280.

Defendants Stofsky and Gold assert (2SG Br., pp. 9-13) that the government's decision not to disclose the incomplete bank records discovered after the end of the trial, *ipso facto*, requires the application of a more liberal standard than that used to determine their first new trial motion. While precedent on this issue is sparse, the lower Court in *Rosner* said: "Where post-trial suppression is alleged . . . the court's proper inquiry is into the effect of the disclosures on any new trial motion that has been made." *United States* v. *Rosner*, 72 Cr. 782, slip op. at 23 (S.D.N.Y. Aug. 15, 1974). This Court in affirming *Rosner* confirmed that in such circumstances "[t]he question is whether there was prejudice to the defendant." 516 F.2d at 281. Here the trial court correctly applied precisely those standards and found that there had been no prejudice to defendants, and that, indeed, defendants had alleged none (AA 84-85).

Defendants' present parade of hypothetical horribles (2SG Br., pp. 10-11) could hardly be more inappropriate, given the facts of this case. Here the government moved steadfastly to obtain the remainder of the then incomplete bank records and to conduct a further investigation in order to determine if those records possessed any genuine

significance to the issues raised by these motions. Unlike *Rosner*, the government then *sua sponte* revealed to defendants all the information it had and agreed to have the appellate process stayed. Defendants then fully aired all of their additional contentions, based on all of the evidence available, before the same District Judge, who then denied the motion. In such circumstances, "it is hard to see why the same judge, hearing the same story, would have decided it differently at an earlier time."* *United States* v. *Rosner*, *supra*, 516 F.2d at 281.

F. The trial court correctly found that the "newly discovered evidence" would not probably have produced a different verdict.

Defendants attack the trial court's denials of their motions, asserting that the court erroneously required them to show that the new evidence would "lead *inevitably* to the conclusion that Glasser had lied about the payoffs to defendants" (2 HL Br., pp. 31-32), whereas at its strictest the law only requires a showing that it would "probably have produced a different verdict." The contention is baseless. The trial court's remark quoted above was made in rejecting the logically fallacious analysis which has characterized defendants' arguments both here and below.

In its Memorandum Opinion dated June 12, 1974, the trial court found that the new evidence demonstrated that Glasser lied about the source of his savings and

---

* Defendants' reliance (2SG Br., pp. 12-13) on *United States* v. *Seijo*, *supra*, is misplaced. *Seijo* is another in a settled line of cases dealing with an inadvertent failure by the government to disclose to the defense *before trial* specific items of evidence in the government's possession which tended to exculpate the defendant—including evidence which would have revealed the falsity of a government witness' trial testimony.

also affirmatively demonstrated that some $58,000 of the savings had been deposited in cash during years 1967-1970. The Court then turned to an analysis of defendants' contentions:

> "The defendants do not seriously argue that it is this false testimony [about the source of the savings], or that it is the failure to state this 'truth' about the cash deposits, which convicted the defendants. Standing alone, these matters are collateral to the elements of the offenses charged against these defendants. Instead, they seek to elevate the collateral to a level of materiality by asserting that 'the source of these cash deposits could be explained only by concluding that Glasser perjured himself when he testified that he gave any of the monies to one or more of the defendants.' Thus, they contend that the new evidence established that Glasser lied about what is, without doubt, the most material portion of his testimony. The new evidence establishes no such proposition. It does not directly address Glasser's testimony with respect to payments to the defendants, nor does it lead inevitably to the conclusion that Glasser lied about the pay-offs to the defendants. It is far too wide a leap in reason to assert that just because Glasser accumulated $57,000 in cash during the critical time period that, *a fortiori*, a jury hearing these facts could only conclude that he kept the whole of the mere $11,000 he said he gave the defendants. On the contrary, the figures alone are so incongruous as to lead to no conclusion at all.
>
> The defendants themselves, in other portions of their papers, state the wholely sensible premise that this new evidence 'would indicate to a jury that there were much larger payments and/or payments from many additional sources' " (A 803a).

The foregoing makes abundantly clear that the court, in stating that the new evidence did not lead inevitably to the conclusion that Glasser lied about pay-offs to the defendants, was simply rejecting defendants' illogical assertion that it did. Moreover, whether Glasser secreted $58,000 or $157,000 in his checking and savings accounts would have little logical relation to his testimony that during the period 1967-1969 he made payoffs to defendants of approximately $11,000 (AA 86).

Noting that the new evidence would have served only to impeach Glasser's testimony regarding the source of the money in his savings accounts—testimony which had been elicited only on cross-examination—see *United States ex rel. Rice* v. *Vincent*, 491 F.2d 1326 (2d Cir.), *cert. denied*, 419 U.S. 880 (1974); *United States ex rel. Fain* v. *Deegan*, 410 F.2d 13 (2d Cir.), *cert. denied*, 395 U.S. 935 (1969), the trial court went on to find that with respect to the completed trial the new evidence would not have altered the quantum of impeaching effect already occasioned by substantial defense efforts. See *e.g.*, *United States* v. *Pfingst*, 490 F.2d 262, 276-277 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974). Defendants had fully set forth their theory of defense in summations, in their cross-examination of Glasser regarding his tax returns, savings accounts and assets generally, and by the introduction of the probate records pertaining to the estates of Mrs. Glasser's parents.* The "jury may well have accepted

---

* Indeed, in summation the government virtually conceded that Mrs. Glasser had not inherited any $120,000 in the 1940's in the fashion the Glassers had testified to. The government did argue that the probate records did not necessarily reflect all of the ways in which the Glassers may have received such moneys; did not reflect "what *may* have passed as a result of gifts prior thereto, what trusts *may* have been in existence"; and did not deal with moneys received under the table (A 628a) (emphasis added). Defendants' assert that the government's use of terms like "gifts", "trusts" and "under-the-table payments" was so arcane

[Footnote continued on following page]

the [defendants'] contention which was so forcefully presented [that the Glassers' lied about the source of their savings] but nonetheless was satisfied that the government had satisfied its burden as to the essential elements of the crimes charged." *United States* v. *Marquez*, *supra*, 363 F. Supp. at 807. Indeed, as the trial court found:

> "Even without Glasser's subsequent explanation, these two inferences of other or larger payments [from manufacturers], or both, could have occurred to the jury [as the source for some substantial portion of the $120,000], and would not have necessarily or 'probably' produced a different verdict" (A 803a).

With respect to the impact of the new evidence at any retrial, the trial court correctly found it unlikely that

---

as to suggest to the jury that these were matters beyond their understanding (2HL Br., p. 7). The contention is absurd. The government did no more than argue the obvious: that the probate records did not necessarily provide a complete picture of the wealth Mrs. Glasser may have received from her parents before or at the time of their deaths. Similarly without merit and belied by the very record relied on is defendants' contention that the quoted remarks constituted unsworn testimony of the prosecutor (2HL Br., p. 27 n.14). It is noteworthy that the assertedly improper remarks occasioned no objection from the several experienced lawyers constituting the defense team. The absence of any such objection or request for a curative instruction indicates their difficulties then in finding any impropriety such as is alleged now. See *United States* v. *Canniff*, Dkt. No. 75-1078 (2d Cir. Aug. 13, 1975) Slip op. 5609, 5618 n6. See also *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

Furthermore, defendants' contention that the jury must necessarily have been persuaded by the prosecutor's remarks is little more than rank speculation which flies in the face of the trial court's finding that the "probate records . . . established that the inheritance story was not true" (A 804a) and "that Glasser had not told the truth about the source of the $120,000" (A 805a).

defense counsel would actually attempt to use the evidence of cash deposits as substantive support for the defendants' theory, given the risk in exposing to the jury Glasser's explanation further inculpating defendants in a broader scheme of misconduct (A 804a).

Defendants assert that the evidence of Glasser's false trial testimony and that of his wife, and Glasser's inconsistent statements to the government could be used at any retrial to destroy Glasser's credibility. The trial court concluded, however, that to do so would almost inevitably raise "the spectre of a far wider, broader scheme involving these defendants" (A 804a).

Defendants argue that this finding of the Court—that they could use this new evidence to impeach Glasser only at the high cost of further incriminating themselves—necessarily means that the trial court "credited Glasser's post-trial explanations to the United States Attorney as completely true and credible . . . [and that it did so] without the benefit of a hearing at which Glasser's new story could be cross-examined . . ." (2HL Br., p. 32). But the trial court did no such thing. It sought only to measure the impact on a hypothetical jury at a retrial of the competing testimony and contentions of Glasser and of the defendants with respect to the evidence of additional deposits in the Glasser accounts. At any such retrial Glasser would testify that a substantial part of those deposits were his portion of additional payoffs from numerous other manufacturers the remainder of which he gave to

---

* Indeed, at any retrial the government might well elect to offer Glasser's testimony, and whatever corroborating evidence, of the payoffs from these additional manufacturers which antedated the payoffs alleged in the indictment as probative of the origins of the conspiracy charged. See *United States* v. *Cohen*, 384 F.2d 699 (2d Cir. 1967).

various union officials—almost invariably one or more of the defendants. The defendants, too, would likewise assert that the bank records showed that Glasser was taking other and much larger payoffs from manufacturers (A 803a; SG Br., pp. 39-40) and that his dealings with manufacturers were far broader than he previously had testified to (AA 16-17). As they urged below, however, defendants would assert at any retrial that the new evidence sustains the view that Glasser kept all of the money paid to him by manufacturers, deceiving the latter into believing he was making payments to the union in their behalf, all the while knowing that the union had insufficient staff to police the anti-contracting provisions of the agreement. As correctly noted by the Court, however, the basic flaw in that thesis is that even if the union lacked the personnel to enforce the agreement, and Glasser knew it, the manufacturers must also have known; and they would not have continued to pay him during a period of three years, much less for eight years during 1962-1970, as reflected by the evidence of additional deposits, unless they knew it was necessary to pay off union officials in order to circumvent the agreement and were convinced Glasser was so doing with their money (A 805a).

Weighing the inherent implausibility of defendants' thesis and all of the other evidence in the case, the Court found simply that "[a] more reasonable and more damaging explanation [than that of defendants] [and one which a jury at a retrial would be more likely to accept] would be that the extent of the scheme involving the defendants was far more widespread than previously known" (AA 87). In such circumstances, defendants' efforts to impeach Glasser by means of his prior false testimony would involve them in proof of a broader scheme, with

the net result that their efforts at impeachment would not "probably produce a different verdict."*

Furthermore, in weighing the impeaching impact the new evidence would have had, the court correctly noted that there was substantial independent evidence corroborating Glasser's testimony. There was sufficient evidence of the nature of the industry for the jury to conclude that what Glasser had said regarding union payoffs was true, irrespective of the source of the money in his savings accounts. Clearly Glasser, as a manufacturer's representative, was powerless to provide permission to violate the agreement in the absence of union complicity. He was, however, perfectly positioned between the manufacturers and the union defendants to function as a "bag-man." Cf. *United States* v. *Rosner*, *supra*, 516 F.2d at 283 n.8 (3). As to the payments by the manufacturers to Glasser, Daniel Ginsberg testified at the trial that he had made the payments as Glasser claimed and had received the highly favorable treatment Glasser described (see, *supra*, pp. 27-28); and three of the remaining four manufacturers who are alive admitted making payments to Glasser for the purposes Glasser had said and pleaded guilty before the trial judge herein to violations of the Taft-Hartley Act. As to acceptance of payments by defendants from Glasser, Harry Jaffee testified that he had received payoffs through Glasser

---

* Contrary to defendants' claims, in making such a finding the trial court did not rely on any of Glasser's statements concerning the size of Mrs. Glasser's inheritance, nor did it make any findings of fact concerning the size of that inheritance. In the face of Glasser's admission that he had accepted payoffs from numerous other fur manufacturers and that he had testified falsely at trial when he said that for the most part the $120,000 in savings was attributable to the inheritance, the precise amount of an inheritance received in the 1940's was of little or no import in determining what a hypothetical jury might do.

as Glasser claimed. Further, a pattern of acceptance of illegal payments from manufacturers by defendants was established by the testimony of two other manufacturers, Walter Stiel and Daniel Grossman—who made direct payoffs involving two of the defendants—by evidence of Gold's statements to Grossman that sometimes intermediaries were used to funnel money to the defendants (see, *supra*, p. 38); by Grossman's testimony of his use of Koch and Koster for that purpose (see, *supra*, pp. 36-37); by the uncontradicted evidence that the manufacturers making payoffs were accorded unusually favorable treatment by the union regarding the sanctions, if any, imposed for violations of the agreement; and by the equally persausive fact that once manufacturers ceased making those payoffs (as for example upon Glasser's departure from the fur industry and Grossman's determination to cooperate with the government) prompt and harsh penalties were imposed by the union on their firms (see, *e.g.*, *supra*, pp. 20, 21, 24, 41).

Other details of Glasser's testimony were corroborated by attorneys Anolik and Cammer who confirmed that Hoff and that Stofsky and Gold had assisted Glasser in obtaining counsel in connection with, respectively, his forced departure from the fur industry and his appearance before a federal grand jury.

While it is true that absent Glasser's testimony there was no direct evidence that defendants Hoff and Lageoles were the recipients of payoffs, it misstates the case in the extreme to say that the independent evidence "did not implicate defendants Hoff and Lageoles in any manner whatsoever" (2HL Br., p. 33). Hoff, for example, was the second most powerful figure in the union who served as the union's advocate in enforcement proceedings and the union's business agent for several of the largest and most successful manufacturers. This latter group in-

cluded the firm owned and operated by Daniel Grossman, at a time when that firm was contracting on a massive scale and Grossman was making payoffs of $12,000 a year to the union for the privilege of doing so. While even circumstantially it is clear that Grossman's notorious and unpenalized violations could not have occurred in the absence of Hoff's complicity, Grossman specifically testified that Hoff had arranged and accompanied Stofsky to several incriminating meetings among the three of them at which various facets of the illicit arrangement were discussed (see, *supra*, pp. 39-40). Similarly, the ample evidence of the extraordinarily favorable treatment the union accorded those manufacturers who paid for the privilege of violating the agreement could properly be traced directly to Hoff's doorstep—since in the case of each manufacturer's violation of the agreement it was Hoff who wielded the final authority for formulating the union's position.

While the circumstantial evidence of Lageoles' knowing participation in the crimes alleged was less extensive, the jury had before it the character of the industry and evidence of Lageoles' relationship with the other defendants and the interrelated character of their duties, as well as the evidence of the highly favorable treatment the union accorded those firms Lageoles serviced, the owners of which, according to Glasser, were making payoffs.

Given the foregoing, there was a clearly sufficient basis for the trial court's findings that the new evidence of cash deposits or the fact that Glasser lied about the source of his savings would not probably have produced a different verdict at the original trial and would not probably produce a different verdict at a retrial. Defendants' claim warrants no relief.

POINT II

The indictment was valid, having been returned by an Organized Crime Grand Jury, empaneled pursuant to 18 U.S.C. § 3331, during its lawfully extended term.

Defendants attack the validity of the indictment on which their convictions rest. Relying on *United States* v. *Fein*, 504 F.2d 1170 (2d Cir. 1974) and *Wax* v. *Motley*, 510 F.2d 318 (2d Cir. 1975), they contend that since the grand jury which returned the indictment was summoned pursuant to an order which referred neither to 18 U.S.C. § 3331 nor to Rule 6 of the Federal Rules of Criminal Procedure, it must be deemed to be a creature of Rule 6, with a life span of no more than 18 months; and that the indictment, returned during the 27th month of the grand jury's life, is therefore invalid. The contention is in error. Whatever the ambiguity of the empaneling order, the circumstances surrounding its signing and the undisputed facts of the grand jury's actual empaneling amply support the District Court's finding that the grand jury in question was a "special grand jury" within the meaning of Chapter 216 of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3331-3334 (1970) (hereinafter an "Organized Crime Grand Jury"), and that the indictment herein was returned during one of the lawful extensions of that grand jury's term (AA 128-130).

A. The April 20, 1971 grand jury: summoned, empaneled and extended

By order dated March 23, 1971, some six months after the effective date of the Organized Crime Control Act of 1970 (the "Act"), the late Hon. Sidney Sugarman, then Chief Judge of the United States District Court for the

Southern District of New York, directed that "an additional grand jury" be empaneled on April 20, 1971 (AA 98). Judge Sugarman's order did not specify whether the grand jury was to be empaneled pursuant to Title 18, United States Code, Section 3331, or pursuant to Rule 6(a) and (g) of the Federal Rules of Criminal Procedure. It did not state, as did the order in *United States* v. *Fein*, *supra*, and *United States* v. *Macklin*, Dkt. No. 75-1189 (2d Cir. Sept. 4, 1975) Slip op. 5911, 5912 that the grand jury was to sit 18 months.* In short, on its face the order, like that sustained in *Wax* v. *Motley*, *supra*, against a similar attack, "sheds no light on what sort of grand jury actually had been empaneled." 510 F.2d at 320.

The order was premised upon a certificate of Daniel P. Hollman, a Special Attorney of the Department of Justice and then Attorney-in-Charge of the New York Joint Strike Force on Organized Crime and Racketeering, requesting the empaneling of such a grand jury (AA 99).

On April 20, 1971, pursuant to Judge Sugarman's order, the grand jury challenged here was convened. United States District Judge Dudley B. Bonsal, presiding for the District Court, empaneled, swore in and charged that body as an Organized Crime Grand Jury pursuant to 18 U.S.C. § 3331. Immediately upon its empaneling, Judge Bonsal instructed the jury:

> "*You twenty-three ladies and gentlemen have just been empaneled and sworn as a special grand jury. It is rather an historical event, ladies and gentlemen, because you are the first grand jury to have been empaneled under an act of Congress known as the Organized Crime Control Act of 1970, the first time we have had one here*" (AA 112).

---

* As defendants correctly point out, the language and form of the order were in essential respects the same as that employed in other like orders entered by the District Court during that period—including orders entered both before and after the effective date of the Act.

The Court then notified the grand jury, as Mr. Hollman of the Strike Force had earlier (*id.*), that the grand jury would serve for a period of eighteen months, that that time could be extended by periods of six months, but that "*in no event* [*would its*] *term of service exceed thirty-six months*" (AA 112) (emphasis added).

During his charge Judge Bonsal further instructed the grand jury that "under the statute pursuant to which you were empaneled, you have additional powers not normally conferred on grand juries" (AA 119) and went on to describe the unique powers of an Organized Crime Grand Jury to make and file reports pursuant to Title 18, United States Code, Section 3333 (AA 119-121).

Subsequently the grand jury, under the guidance of the Strike Force, undertook to investigate organized criminal activity within this judicial district (see AA 139). Its 18 month term, which would have expired on October 20, 1972, was extended by six months until April 20, 1973 by an order of Chief District Judge David N. Edelstein, dated October 12, 1972 and filed four days later. That order specifically relied on Title 18, United States Code, Section 3331(a) as authority for the extension (AA 107).

On April 16, 1973 United States District Judge Morris E. Lasker signed a further order extending the life of the grand jury from April 20, 1973 until October 20, 1973. That order, filed on April 23, 1973, was, like the first extension order, specifically premised upon Title 18, United States Code, Section 3331(a), as authority for the extension (AA 109).

The indictment was filed on June 21, 1973, during the period provided for by the second extension.

B. The April 20, 1971 grand jury was an Organized Crime Grand Jury, having actually been empaneled, sworn and charged as such.

Notwithstanding the facial ambiguity of Judge Sugarman's empaneling order, and assuming for the moment the lack of any circumstances surrounding its signing which would clarify the intent of its author (but see *infra*, pp. 85-90), it is nonetheless abundantly clear that the grand jury which "actually had been empaneled" pursuant to Judge Sugarman's order was an Organized Crime Grand Jury. See *Wax* v. *Motley*, *supra*, 510 F.2d at 320. Judge Bonsal, the presiding judge on April 20, 1971, described the occasion as an "historical event". His charge makes clear that, acting for the District Court, he that day participated in empaneling and swearing in the first Organized Crime Grand Jury ever convened in this District. Judge Bonsal's conduct—coming at a time when Judge Sugarman's original order was still executory —coupled with his crystal clear charge to the jury, were fully consistent with and served to explicate the earlier ambiguous order of the Court signed by Judge Sugarman.

The record of the April 20, 1971 conduct of both the District Court and the government (in the person of Mr. Hollman of the Strike Force), leaves no doubt that both fully intended that the grand jury empaneled that day pursuant to Judge Sugarman's order be an Organized Crime Grand Jury. Defendants so concede. Accordingly, this is not a case where an ambiguous empaneling order, followed by an equally ambiguous empaneling process, presented the government, at the end of the grand jury's 18 month term and based on its exhibited prosecutorial bent, with an opportunity to elect at its whim to treat that

body either as an Organized Crime Grand Jury whose term could lawfully be extended, or a regular grand jury whose life had expired. Indeed, from the moment of its creation and throughout its ensuing life, the grand jury was treated and constantly functioned as an Organized Crime Grand Jury. The two orders extending its term were explicitly premised on 18 U.S.C. § 3331 and, under the guidance of the Strike Force, it investigated organized criminal activity within this District.

Defendants, understandably, choose to characterize as irrelevant the undisputed fact that the grand jury actually empaneled was an Organized Crime Grand Jury. They assert, instead, relying on *Wax*, that it is Judge Sugarman's intent which is controlling, that the latter cannot adequately be discerned from the present record and that the resulting ambiguity must be construed adversely to the government. But in *Wax*, it is well to remember, this Court and the lower court were confronted with a facially ambiguous empaneling order whose execution by the District Court (that is, the actual empaneling, oath and charge) shed no light on what sort of grand jury "actually had been empaneled."* 510 F.2d at 320. Here, whether one chooses to characterize the District Court's conduct of April 20, 1971 as effecting, *nunc pro tunc*, an explication, hence amendment, of a hitherto ambiguous and executory empaneling order, or whether one chooses to treat that conduct, as did the District Court, as evidence of Judge Sugarman's original intent—a subject to

---

* A review of the record in *Wax*, including the transcript of the charge to the grand jury and the parties' briefs on appeal, makes clear that the empaneling and charge there shed essentially no light on what sort of grand jury actually had been empaneled.

which we now turn—the result we respectfully submit must surely be the same.*

C. By his order of March 23, 1971, Judge Sugarman intended to summon an Organized Crime Grand Jury.

The District Court correctly concluded that given the circumstances surrounding the signing of the order and Judge Bonsal's charge to the jury, it is abundantly clear that Judge Sugarman's order of March 23, 1971 was meant to be premised on 18 U.S.C. § 3331. The application of the Stike Force, contained in Mr. Hollman's certificate, from which the empaneling order flowed, was the first request by that office for the creation of a grand jury subsequent to the enactment of the Act on October 15, 1970 (AA 126). The Strike Force, with its singular interest in the detection and prosecution of organized criminal activity, clearly intended upon passage of the Act to make full use of each of the new powers thereby conferred, including those governing the creation of Organized Crime Grand Juries (AA 126), and Judge Sugarman could properly have so inferred.**

---

* It is not amiss to note here that there is no evidence or reason to believe that Judge Sugarman ever repudiated Judge Bonsal's interpretation and execution of the empaneling order—conduct which was historically noteworthy and which delivered into being an unprecedented institution.

** In its applications to the District Court since the passage of the Act for the empaneling of grand juries, the Strike Force in this District has sought to have convened only Organized Crime Grand Juries. Defendants Hoff and Lageoles assert that this latter fact ought not to be considered here because it is founded, as concededly it is, on a hearsay declaration in the prosecutor's affidavit submitted to the lower court. No such objection was raised below, however. Moreover, defendants Hoff and Lageoles have never alleged in any forum that the statement is in error.

Furthermore, given the unique circumstances here, "[i]t is reasonable to assume", as the District Court said, "that Judge Bonsal before making his remarks undertook to ascertain the factual basis for his assertions" (AA 129). The empaneling, regarded by Judge Bonsal as an "historical event", took place less than one month after the original order had been signed. The body created was historically unique and a creature of statute, rather than of the Strike Force, or any other prosecutor's office. In these circumstances, Judge Bonsal could hardly have delivered into being such an unprecedented body on the strength of the representations of anyone other than Chief Judge Sugarman.

Further evidence of Judge Sugarman's intent is provided by the fact that the April 20, 1971 grand jury was the only Organized Crime Grand Jury empaneled in this District at any time within the first 18 months following the effective date of the Act (AA 127).* That fact is significant because Title 18, United States Code, Section 3331(a) provides in pertinent part:

> "In addition to such other grand juries, as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants . . . *shall order a special grand jury* to *be summoned at least once in each period of eighteen months* unless another special grand jury is then serving" (emphasis added).

---

* The Act became effective on October 15, 1970. The Organzied Crime Grand Jury next empaneled after that in issue here was the *Wax* grand jury, which was empaneled on April 18, 1972 —more than 18 months after the effective date of the Act (AA 127).

The legislative history of the Act makes clear that by reason of Section 3331(c) "[s]pecial grand juries are required to be summoned at least once every 18 months in judicial districts containing more than 4 million inhabitants." H.R. Rep. No. 91-1539, 91st Cong., 2d Sess. 39 (1970). In such districts, "the convening of special grand juries is made automatic, while in other regions it is made discretionary with the Attorney General." *Hearings on S. 30 and related proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 97 (1970).

Since the Southern District of New York contains more than four million inhabitants, the District Court was required by Section 3331(a) to summon an Organized Crime Grand Jury sometime during the period of the first eighteen months following the effective date of that Act, *i.e.*, sometime during the period of October 15, 1970 to April 15, 1972. The only grand jury arguably so summoned was the April 20, 1971 grand jury which Judge Sugarman directed be empaneled by his order of March 23, 1971. Chief Judge Sugarman no doubt understood the requirement imposed by Section 3331(a) on the District Court and, by his order of March 23, 1970, in response to an application of the Strike Force, acted to conform the District Court's conduct to the requirements of law.

Defendants Hoff and Lageoles assert in error (2HL Br., pp. 47-48) that such a finding would call into doubt this Court's finding in *Wax* that the grand jury challenged there, empaneled on April 18, 1972, was an Organized Crime Grand Jury. This is so, they argue, because the District Court, before empaneling the *Wax* grand jury, would have been required by 18 U.S.C. § 3332(b) to determine that the volume of business of the extant Organized Crime Grand Jury exceeded the capacity of

that body to discharge its obligations and nc such finding, defendants argue, was made by the District Court. The argument is unsound. First, whatever District Court finding that may have been required by 18 U.S.C. § 3332(b) may well have been provided by the recital—contained in the form of empaneling order for additional grand juries employed during that period and no doubt used in *Wax*—that "the exigencies of the public service require the empaneling of an additional grand jury . . ." (see, *e.g.*, AA 98). Furthermore, whatever the need for a finding, the statute does not require that the District Court publish the same, either orally or in writing, and accordingly there is no basis for concluding that such a finding was not made by the Court prior to the empaneling of the *Wax* grand jury. Lastly and perhaps more importantly, this Court has said that whether and when to empanel two or more grand juries pursuant to 18 U.S.C. § 3332(b) is a "matter [which] rests in the *informed discretion* of the District Court." *Wax* v. *Motley*, *supra*, 510 F.2d at 322 n.1 (emphasis added). *Accord*, *Korman* v. *United States*, 486 F.2d 926, 933-934 (7th Cir. 1973). See also *United States* v. *Lawson*, 507 F.2d 433 (7th Cir. 1974), *cert. denied*, — U.S. — (1975).

Finally, the claim by defendants Hoff and Lageoles that the government failed to adduce sufficient extrinsic evidence of Judge Sugarman's intent is misguided.* As the foregoing makes clear, no additional extrinsic evidence was needed. The character of the grand jury which "actually had been empaneled" and the nature of Judge Sugarman's original intent were sufficiently revealed by

---

* Defendants Stofsky and Gold claim, in contrast, that *Wax* bars the use of any extrinsic evidence to clarify a court order. The District Court properly concluded that the contrary was true (AA 128).

official records of the District Court and the uncontradicted circumstances surrounding the signing of the original order. The District Court properly so found.

Defendants assert that with regard to the issue of Judge Sugarman's intent (2HL Br., pp. 40-43), an inference adverse to the government must be drawn because the latter did not offer the affidavits of, *e.g.*, Judge Bonsal and Mr. Hollman of the Strike Force. That contention is particularly ill founded. Judge Bonsal was equally available to both sides and had defendants believed, in the face of his charge and conduct of April 20, 1971, that his affidavit would have assisted them, they presumably would have made an effort to secure and offer it. Moreover, whatever the state of ignorance of present appellate counsel for defendants Hoff and Lageoles regarding the current employment of Daniel P. Hollman (2HL Br., p. 43 n.20), Hoff and Lageoles themselves must surely know that Stephen Barasch—the attorney who represented them at the earlier stages of this appeal, whose brief on their behalf is before this Court and who actively explored the present issue on their behalf until approximately February 26, 1975 when he formally withdrew—is and was throughout that period the law partner of the same Daniel P. Hollman. See Affidavit of Stephen Barasch In Support of Order to Change Attorney, sworn to on or about February 13, 1975.* Accordingly, any

---

* Interestingly, Mr. Barasch did not formally withdraw until February 26, 1975 (see Docket Entries at AA 3), which was approximately two weeks after February 12, 1975—the date by which the government was required to file its papers in answer to defendants' motion to dismiss the indictment on the grounds discussed in the text of this Point (*id*).

In his affidavit in support of his motion to withdraw, Mr. Barasch stated in pertinent part:

[Footnote continued on following page]

absence in the record of an affidavit from Mr. Hollman may more accurately be said to give rise to an inference adverse to those defendants than to the government.

D. The second extension order of April 16, 1973 was valid.

Defendants Stofsky and Gold argue (2SG Br., pp. 19-20) that Judge Lasker's extension order was not effective because it was not filed until April 23, 1973, three days after the term of the grand jury was to have expired, although signed on April 16, 1973, prior to expiration of the grand jury's term. That argument is of no avail. The District Court correctly found that a written extension order signed by an appropriate judicial officer prior to the expiration of the grand jury's term effectively extends its life (AA 129-130). In so holding, the District Court adopted a common sense construction of 18 U.S.C. § 3331(a),* which correctly took account of the fact that judges normally have no control over the entry of orders—a ministerial task performed by clerks of the Court (AA 129-130). Indeed, the failure of a judge himself to sign his order directing the summoning of a grand jury has

---

"The reason for this request is that a motion has been filed on behalf of all of the defendants to determine whether or not a Grand Jury which returned the indictment in this case was extended improperly and, thus, the indictment is invalid. A member of my firm is Daniel P. Hollman, Esq. who, at the time the Grand Jury was originally impanelled, was a member of the Department of Justice and played a role in the impanelling in this Grand Jury. Therefore, in all likelihood, he will be a witness in this matter and, thus, it is appropriate for your deponent to withdraw as counsel in this case."

* In pertinent part Section 3331(a) provides that the "court may enter an order extending" the term of an Organized Crime Grand Jury for an additional six months.

been held to be a mere technical imperfection or irregularity in the grand jury's proceedings which did affect the validity of a subsequently returned indictment. *Nolan* v. *United States*, 163 F.2d 768, 769 (8th Cir. 1947), *cert. denied*, 333 U.S. 846 (1948). See also *United States* v. *Fein*, *supra*, 504 F.2d at 1173 n.3 and cases cited therein.

Moreover, at the trial herein, the government provided defendants, at their request (Tr. 1788), with copies of the original empaneling order and extension orders. Defendants' failure to voice then an objection to any alleged irregularity regarding the extension orders forecloses them from asserting now any such ground for relief. *Nolan* v. *United States*, 163 F.2d at 770.

POINT III

The jury properly found a single conspiracy among the defendants.

Defendants assert that the evidence showed fourteen discrete conspiracies rather than the single conspiracy charged in the indictment. They argue that each payoff scheme had its own distinct illegal end and that none of the defendants or conspirators in each had reason to know of the existence of, much less the participation of others in, other similar payoff arrangements; and that, accordingly, the jury's finding of a single conspiracy was impermissible as a matter of law, notwithstanding the trial court's concededly proper multiple conspiracy instructions to the jury (A 651a). In contrast to defendants' contentions, however, the evidence established a continuing and largely successful corruption of the union's enforcement activities for personal gain involving a core of common conspirators pursuing a common goal. The jury's verdict was therefore correct.

Viewing the evidence in the light most favorable to the government, the jury properly could have found that the defendant union officials constituted a "core group" of conspirators, *United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963), with whom each of the eight non-defendant union manufacturers had conspired, and that the defendant union officials had entered into a single conspiratorial agreement: to accept illegal payoffs from time to time from union fur manufacturers in return for permitting those manufacturers to violate various provisions of the agreement free of the imposition of harsh enforcement sanctions (Tr. 1111-1112). While the jury properly could have found that each non-defendant manufacturer had conspired not only with the defendants but with each of the other non-defendant union manufacturers as well,* the issue on this appeal is limited to whether "quoad the [defendant union officials] there was but one conspiracy". *United States* v. *Bruno*, 105 F.2d 921, 923 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939). See also *United States* v. *Borelli*, 336 F.2d 376, 383 n. 2 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965). Accordingly, defendants'

---

* Each of the eight manufacturers was located within a few blocks of the others in a small market; each was a member of the Association and faced with much the same economic motive to violate the agreement and the same desire to avoid union reprisals; six knew of Glasser's daily contacts with the union officials who could provide the permission sought and there was evidence Glasser was known by some as a "bag-man". From the foregoing and the evidence of Grossman's direct knowledge of the involvement of other manufacturers, the jury could properly have inferred that each manufacturer had reason to know that other manufacturers similarly situated were making payoffs to union officials and that each manufacturer relied on the similar practices of the others to create a climate wherein certain union officials would welcome the proffer of such payoffs rather than respond to them with angry union reprisals under the agreement.

assertion that the evidence failed to establish that the non-defendant manufacturers had conspired with or knew of the participation of each of the other manufacturers is not only inaccurate but inapposite.

Further, the government did not claim, nor was it required to prove, that each defendant was aware of, and shared in, each payoff made and received under the umbrella and within the scope of the larger unlawful plan. *See United States* v. *Salazar*, 485 F.2d 1272, 1276-1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). It is settled that a single act may establish one's membership in a conspiracy if it is an act from which knowledge of the general conspiracy can be inferred. *United States* v. *Santana*, 503 F.2d 710, 715 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974); *United States* v. *Ramirez*, 482 F.2d 807, 816 (2d Cir.), *cert. denied*, 414 U.S. 1012 (1973). It was enough here that the jury could properly have found that each defendant had "some knowledge" of the larger common goal of the conspiracy, *United States* v. *La Vecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975), and associated himself with it, both by various affirmative acts and by purposeful non-use of the enforcement powers he was under a fiduciary duty to employ. *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Cohen*, 145 F.2d 82 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945). Given the evidence, the jury could hardly have concluded otherwise.

Each of the defendants had been in the tightly circumscribed industry for over 30 years; each had been a union officer for some ten years and in that capacity had worked with the others on a daily basis;* each was

* Stofsky's assertion on this appeal that there is no evidence he closely supervised the work of any of his subordinates (SG Br., p. 58) runs afoul of his trial testimony that, purportedly, on mere rumor of Jaffee's misconduct he transferred him to a less desirable district and acted to deny him another job (A 368a-371a).

acutely aware that manufacturers violated the anti-contracting and other provisions of the agreement and that the agreement's harsh sanctions constrained those manufacturers to seek to purchase union permission to do so; each, as a member of the 11-man union staff, was an agent for the others, sharing interrelated duties and discretionary powers regarding the enforcement of the agreement's provisions;* and each, within a three year period, knowingly associated himself with payoffs schemes identified with at least two or more such manufacturers, knowing that that scheme enjoyed the participation of other of his co-defendant union colleagues.** While the attempt by defendants' counsel to erect artificial divisions between the defendants and the various payoffs is not without symmetrical nicety, the jury was not required as a matter of law to blind itself to the realities of the marketplace and the facts of the case. See *United States* v. *O'Connell*, 165 F.2d 697, 699 (2d Cir.), *cert. denied*, 333 U.S. 864 (1948).

The testimony of Grossman alone was a sufficient predicate for the jury's finding of such a conspiracy and the membership therein of Stofsky, Gold and Hoff. Stofsky and Gold initially sanctioned Grossman's violations and were the immediate beneficiaries of his payoffs. Hoff's membership therein was evidenced by his arrangement of, and participation in, meetings with Stofsky and

---

* This Court has said that the indicia of criminal partnership may include, among other things, "mutual dependence", "common business offices" and common direction from the core conspirators". *United States* v. *Mallah*, 503 F.2d 971, 976 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 24, 1975).

** The evidence established that eight named manufacturers made payoffs to one or more of defendants. Of those eight firms, direct evidence established that Gold received payoffs from six; Hoff from four; Lageoles from two; and Stofsky from one.

Grossman in late 1971 and early 1972, at which various facets of the scheme were discussed and by his involvement, in his capacity as Grossman's business agent and the union's advocate generally, in the extraordinarily favorable treatment accorded Grossman's firm.* Moreover, Gold's remarks to Grossman made clear that the boundaries of the conspiratorial agreement extended far beyond Grossman's shop—numerous other firms were making payoffs to union officials, *i.e.*, to Gold and presumably other of the defendants, both directly and through intermediaries such as Glasser, Koch and Koster; and Stofsky's call to Grossman, verifying the payoff arrangement, confirmed that Gold served as one of Stofsky's agents in a payoff scheme of far-ranging dimensions.

The extended scope of defendants' agreement was further evidenced by Stofsky's agreement in October 1969 not to prosecute Ginsberg's firm—after confronted by Glasser with the fact of Ginsberg's payoffs to Gold and Glasser—for fear the resulting scandal would jeopardize the existence of the on-going payoff scheme. Moreover, in this, as with the decision not to prosecute Stiel's firm, the jury could properly have inferred Hoff's culpable participation, given his critical responsibility for determining such questions.

Similarly, Lageoles' knowing participation in the above-described conspiracy was properly inferable from the fact that he received through Glasser six payoffs from

---

* Hoff asserts (HL Br., pp. 5-6) that by its verdict on Count One, the jury necessarily concluded that his participation in these meetings was innocent in character. This facile attempt to go behind the verdict simply ignores the myriad other possible explanations for the jury's determination to convict Hoff of the Taft-Hartley objective, and acquit him of the racketeering objective, of the conspiracy charged in that count. *Cf. United States* v. *Zane*, 495 F.2d 683, 689-692 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974).

two different manufacturers during the same period such payoffs were being made to Hoff and Gold and that with the initial payment from each such firm Lageoles could well have inferred from Glasser's remarks that he was joining an already established scheme which enjoyed the participation of other union officials. Moreover, given the interrelated character of Hoff's and Lageoles' duties, the admitted fact that they jointly determined whether to prosecute contracting complaints and whether to conduct book examinations regarding the same (A 452a) and jointly delimited the terms resolving private settlements talks, the jury could properly have found that the non-prosecution of Hessel's firm and the privately arrived at token sanctions for Sherman's systematic contracting violations in January 1968 and August 1970 necessarily bespoke collusive conduct on the part of Lageoles and Hoff and evidenced membership in the single conspiracy charged.

Finally, the existence of that single conspiracy was evidenced by the meetings in early 1972 at which three of the defendants, variously, sought to persuade Glasser not to reveal what he knew of the payoff scheme to federal investigators. Defendants argue (SG Br., p. 56 n. **) in error that none of the 1972 meetings between defendants and Glasser provides any evidence of the single conspiracy charged because the latter had already come to an end. Even assuming that the conspiracy ended at the time defendants contend,* it is clear nonetheless that their statements to Glasser at the 1972 meetings were admissible against them. *United States* v. *Bigos*, 459 F.2d 639, 643 n.5 (1st Cir.), *cert. denied sub nom. Raimondi* v. *United States*, 409 U.S. 847 (1972). Moreover, whether

---

* Defendants adduced no evidence, however, of either their withdrawal from, or the termination of, the conspiracy which, according to the bill of particulars, ended in December 1972.

the conspiracy was then in existence or not, it is settled that "evidence of a conspirator's post-conspiracy activity is admissible if probative of the existence of a conspiracy or the participation of the alleged conspirator." *United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973). *See also Anderson* v. *United States*, 417 U.S. 211, 221-222 (1974); *United States* v. *Super*, 492 F.2d 319, 323 (2d Cir. 1974); *United States* v. *Costello*, 352 F.2d 848, 853-854 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 201 (1968).

In light of the foregoing, it cannot properly be said that the jury's finding of a single conspiracy, pursuant to admittedly correct instructions, was impermissible as a matter of law. Moreover, even assuming *arguendo* that the proof evidenced more than a single conspiracy, defendants have failed to make any showing that any such variance between the proof and pleadings affected their "substantial rights". Accordingly, this asserted ground of error warrants no relief. *United States* v. *Miley*, 513 F.2d 1191, 1207-1208 (2d Cir. 1975).

POINT IV

Various other errors assigned to the conduct of the trial are without merit.

A. Harry Jaffee's testimony was properly admitted.

Defendants assert that the testimony of Harry Jaffee, a former union business agent, had no connection whatever to the charges in the indictment and therefore that it was improperly admitted. The assertion is in error.

Jaffee testified that from 1967 to 1969 Glasser made six to ten cash payments to him, in connection with his duties as business agent for the firms of Schwartzbaum

Furs and Chateau Creations, in return for his agreement not to take action against those firms for their contracting violations. Jaffee's testimony corroborated that portion of Glasser's previous testimony, admitted without objection, that in connection with Schwartzbaum Furs he had paid Jaffee $100 in cash on one occasion for the latter's agreement to ignore the firm's violations. That money, Glasser testified, had knowingly been provided for that purpose by Schwartzbaum.

Glasser's payments to Jaffee were clearly designed to prevent the latter from frustrating the objectives of the on-going conspiracy—the defendants' receipt of payoffs from Schwartzbaum and Hessel in return for union non-interference with the violative conduct of those firms. As the then business agent for the transgressing firms Jaffee was fully capable of seriously impairing the very benefit the manufacturers sought to secure with their payoffs and thus capable of jeopardizing the continued flow of those payoffs from the manufacturers to the defendants. Glasser's payments to Jaffee, which occurred during the life of the conspiracy, were in furtherance of that conspiracy and, as such, fully admissible against the defendants, irrespective of whether the latter knew of such payments and whether Jaffee, himself, could properly be said to have been a member of the single conspiracy charged. *See United States* v. *Bynum*, 485 F.2d 490, 498 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974); *United States* v. *DeSapio*, *supra*, 435 F.2d at 283-284; *United States* v. *Sansone*, 231 F.2d 887 (2d Cir.), *cert. denied*, 351 U.S. 987 (1956).

B. Glasser's testimony of the manufacturers' statements to him was properly admitted.

Defendants contend that Glasser's testimony of the manufacturers' statements to him, save those of Ginsberg, was improperly admitted because the government failed to establish that the manufacturers were members of the conspiracy charged by a fair preponderance of the evidence independent of the hearsay utterances complained of. *See United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970). The contention is frivolous and simply ignores the substantial non-hearsay evidence adduced.

Invariably, each manufacturer approached Glasser and requested his assistance in establishing an arrangement with the Union wherein, for an agreed upon price, the firm would be permitted to violate various provisions of the agreement. Glasser told the manufacturer he would let him know and thereafter conversed with one or more of the defendants, detailing the manufacturer's proposal. After each pertinent defendant had declared his agreement, Glasser reported the fact of union agreement to the manufacturer. After hearing of the union's agreement, the manufacturer told Glasser he was willing to pay a specific price and thereafter paid Glasser a sum certain in cash, which Glasser and the pertinent defendants later shared.

Of the foregoing sequence, only Glasser's testimony of the manufacturer's initial overture and assertion of the price he would pay was, arguably, hearsay in nature and even this testimony was properly admissible as a verbal act. *United States* v. *Wiley*, Dkt. No. 75-1082 (2d Cir. July 29, 1975) Slip op. 5211, 5215; *United States* v. *D'Amato*, 493 F.2d 359, 363-364 (2d Cir.), *cert. denied*,

419 U.S. 826 (1974).* The remainder of Glasser's testimony clearly was not hearsay and alone provided more than sufficient basis for the trial court's finding that the government had met the burden imposed by *Geaney*. Glasser's first-hand testimony of the statements and questions he put to the various defendants and the non-defendant manufacturers is beyond any hearsay challenge, *United States* v. *Santana*, *supra*, 503 F.2d at 717, and his testimony of the remarks of the various defendants to him was properly considered for *Geaney* purposes as admissions of the defendants. His testimony of the acts of cash payments to him and his repayments to various of the defendants was, of course, in no sense hearsay.

Additionally, there was considerable circumstantial evidence establishing that each manufacturer had a motive and received a benefit consistent with a finding of membership in the conspiracy; and the conduct of Glasser and the periodic payments by the manufacturers thereafter were entirely consistent with the content of the challenged conversations. See *United States* v. *Santana*, *supra*, 503 F.2d at 717. Moreover, any arguably required further indicia of the reliability of the hearsay statements attributed to the manufacturers was supplied by the fact that the declarant manufacturers and the "listener witness" Glasser knew each other to be members of the conspiracy at the time the challenged statements were made, *United States* v. *Mallah*, *supra*, 503 F.2d at 980, and by the fact that the challenged declarations of the manufacturers

---

* It is difficult to discern, however, how the manufacturer's overture to Glasser—which was a request uttered in the interrogative voice—can accurately be said to have been offered for the truth of the matter stated. Such a request simply contains no testimonial assertion. *Anderson* v. *United States*, *supra*, 417 U.S. at 219-220 and n. 7, 8.

were against their penal interest. *United States* v. *D'Amato, supra,* 493 F.2d at 365; *United States* v. *Puco,* 476 F.2d 1099, 1107 (2d Cir.) (*en banc*), *cert. denied,* 414 U.S. 844 (1973). *Cf. Dutton* v. *Evans,* 400 U.S. 74, 89 (1970); Rules 803(3), 804(b)(3), Federal Rules of Evidence (eff. July 1, 1975).

C. The prosecutor's comments in summation on the absent manufacturers were entirely proper.

Defendants claim that the prosecutor violated the trial court's directive to him not to refer in summation to the fact that four of the manufacturers Glasser had identified as the source of payoffs—Sherman, Hessel, Cohen and Schwartzbaum—had been indicted and were awaiting trial;* and that the resulting prejudice of the prosecutor's remarks was so great that the subsequent curative instruction given by the trial court was insufficient as a matter of law. The claim is legally and factually in error and warrants no relief.

Prior to summation, the prosecutor had asked the court for a directive that neither side be permitted to comment on the absence of the four above-mentioned manufacturers who had been indicted and were awaiting trial.** Defendants' counsel objected, stating he intended to com-

---

* While there was little or no evidence the manufacturers knew the precise identity of the union officials who were receiving a portion of their payoffs, that fact could not shield them from criminal liability. See 29 U.S.C. § 186(a); *United States* v. *Lanni,* 466 F.2d 1102, 1107 n.17 (3d Cir. 1972); *United States* v. *Pecora,* 484 F.2d 1289 (3d Cir. 1973); nor could it preclude a finding that the manufacturer and pertinent union officials were co-venturers. *United States* v. *Wyler,* 487 F.2d 170, 173 (2d Cir. 1973).

** Of the other two, Ginsberg had testified and there was evidence Baker had died.

ment on the government's failure to call those witnesses. He argued that the missing manufacturers were unavailable to the defense because defendants' counsel had been advised by counsel for the manufacturers that if the latter were called they would invoke their Fifth Amendment privilege against self incrimination; but that they were available to the government because it alone could compel their testimony by granting them so-called use immunity. See 18 U.S.C. §§ 6002-6003. The trial court thereafter resolved what it said was a "tough question" by permitting defendants' counsel to comment on the manufacturers' absence in a circumspect manner and directing the prosecutor not to refer to the fact of the manufacturers' indictment (A 590a).

In summation defendants' counsel several times argued the absence of these manufacturers as the basis for an inference adverse to the government, and suggested to the jury by implication that while those manufacturers may have paid moneys to Glasser, they had done so in a gratuitous maner, neither intending nor expecting that those moneys would go beyond Glasser to anyone else (Tr. 1805; A 611a-613a). In response to those arguments the prosecutor commented:

> "But beyond that, beyond the defendants' admissions and the other evidence establishing principally Glasser got these moneys, you may consider this fact, that the manufacturers had they simply paid Glasser with no other understanding [than] that he keep the money, based on what his Honor will charge you is the law under the Taft-Hartley Act, you may find that they would not have been committing a crime, these manufacturers, and if that is the case, they should be ready, willing, and able to come in here and say, 'All right, we paid Jack Glasser, a member of the trade

> association, but we never knew the moneys were going to the union officials, we had no idea, we are not guilty of Taft-Hartley violations.'
>
> Why have they not been called to testify, to that? Why didn't they simply walk up and say, 'Oh, yes, we paid Jack Glasser; it had nothing to do with the union.' Both sides have the subpoena power. [If] [i]t was a crime, though, and if any of these manufacturers did foresee or intend these moneys would go to union officials, you may consider whether and how probable it is that they could be called by the Government to testify" (A 622a).

The foregoing was a fair response to the clear suggestions in defense counsel's argument that if moneys had been paid by the manufacturers to Glasser, they had been intended as gratuities for him alone. As such the prosecutor's remarks were wholly proper. See *United States* v. *Deutsch*, 451 F.2d 98, 116-117 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). *Cf. United States* v. *Malizia*, 503 F.2d 578, 580-581 (2d Cir. 1974).

Nowhere in the prosecutor's remarks is there an express or implied reference to the manufacturers' indictment; and defendants' assertion that the prosecutor flagrantly violated the trial court's directive in that regard is simply erroneous. Moreover, the trial court's directives to counsel on this issue gave to defendants, in the first instance, much more than they were entitled.

It is well settled that the government is under no duty to grant a prospective defense witness use or transactional immunity to permit him to testify. *United States* v. *Bautista*, 509 F.2d 675, 677-678 (9th Cir. 1975); *Cerda* v. *United States*, 488 F.2d 720, 723 (9th Cir. 1973); *United States* v. *Jenkins*, 470 F.2d 1061, 1063-1064 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *Earl* v.

United States, 361 F.2d 531, 533-535 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). *See also In Re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973). Moreover, "[w]here a Fifth Amendment testimonial claim has been invoked by a witness and granted, the Government's refusal to grant him immunity in order to permit him to testify does not give rise to a missing witness instruction," *i.e.*, that the witness was peculiarly available to the government and that the jury might infer from the government's failure to call him that his testimony would have been unfavorable to the prosecution. *Morrison* v. *United States*, 365 F.2d 521, 524 (D.C. Cir. 1966). In such a situation, instructed *Morrison*, counsel for both sides should abstain from making any "missing witness" argument (id.)—exactly the position urged by the government on the court below (A 586a). *Accord*, *Bowles* v. *United States*, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971).

Defendants suggest (SG Br., p. 68 n.*) that *Morrison* is inapposite because the government there was empowered to grant only transactional and not also use immunity as here. They cite no authorities, and we know of none, which warrant any such distinction. Indeed, if anything, *Morrison* is here applicable *a fortiori*. In *Morrison* the defense called one Hoffman, who had been indicted as a co-defendant with Morrison, but had pleaded guilty to another narcotics charge. As a consequence, the indictment in which he appeared as Morrison's co-defendant had been dismissed as to him. Hoffman, out of the jury's presence, invoked his claim against self-incrimination. The defense thereafter requested that the government grant Hoffman immunity under 18 U.S.C. § 1406 (1964), and proffered that Hoffman, if immunized, would testify in a manner, detailed by counsel, which would fully exculpate *Morrison*. Here, in contrast, the missing witnesses were under indictment and scheduled to be tried before

the same district judge and by the same prosecution team which tried the case at bar; the prospect that the compelled testimony of the manufacturers would provide a substantial predicate for an argument that their subsequent prosecutions were "tainted" was real and immediate.* Here, moreover, defendants never announced to the trial court or the government their desire to call the manufacturers, never requested that these "missing witnesses" be immunized, and never made any proffer of the expected testimony and how it would exculpate defendants.** Further, defendants simply failed to establish that these witnesses were truly unavailable to them. The mere assertion by defendants' counsel that he had been advised by counsel for the various manufacturers that their clients, if called, would invoke the Fifth Amendment is utterly insufficient. This Court has said that "[t]he only way adequately to establish unwillingness of a witness to testify is to compel the presence of the witness and test the question before the court." *United States* v. *Sanchez*, 459 F.2d 100, 102 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972). *Accord, United States* v. *Zane*, *supra*,

---

* A highly attenuated notion of "taint", never directly passed upon by this Court, has been applied by some courts in connection with use immunity statutes. *United States* v. *Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir.), *cert. denied*, 419 U.S. 872 (1974); *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973); *United States* v. *Mitchell*, 384 F. Supp. 562 (D.D.C. 1974). While the government's position is that the "taint" doctrine in *Dornau*, *McDaniel* and *Mitchell* goes too far, the present uncertain state of the law establishes the high degree of risk in granting use immunity to secure testimony from a defendant about the very matters for which it is intended that he should later be tried.

** It is not amiss to note that three of these manufacturers later pleaded guilty to making payoffs to one or more of defendants herein through Glasser and the fourth was convicted after trial of similar offenses.

495 F.2d at 699. Defendants' failure to do so here alone warrants denial of the relief requested.

Finally, any arguable error in the prosecutor's remarks was promptly corrected by the court in its curative instruction to the jury that the manufacturers were unavailable to defendants and also to the government since the latter had chosen not to apply for immunity for them (A 631a). *Cf. United States* v. *Mallah*, *supra*, 503 F.2d at 978-979. That instruction, if anything, suggested an inference adverse to the government.

POINT V

The convictions of defendants Stofsky, Hoff and Gold for income tax evasion were entirely proper.

A. Defendants were not entitled ot an administrative conference with the IRS before the grand jury could indict them for income tax evasion.

Defendants Stofsky, Hoff and Gold argue that their convictions for income tax evasion (Counts 25 and 26, 27 and 32 and 33, respectively) must be dismissed because they were not afforded an administrative conference with officials of the IRS as allegedly prescribed by IRS Regulation, Section 601.107(b)(2), 26 C.F.R. § 601.107(b)(2). This argument, rejected by the trial court (A 39a-40a), not only completely ignores the power of a grand jury to return an indictment for criminal conduct but rests upon a regulation of the IRS which was no longer in effect at the time the indictment herein was voted.

The grand jury has the broadest power to investigate all possible violations of the criminal law, *United States*

v. *Reide*, 494 F.2d 644, 647 (2d Cir. 1974), and to return an indictment when the evidence before it warrants such action. See, *e.g.*, *Hale* v. *Henkel*, 201 U.S. 43, 65-66 (1905). No authorities have been cited by the defendants which would invalidate a grand jury's action in a criminal tax case simply because a taxpayer defendant was not afforded a formal opportunity to a conference to explain the facts to the IRS. Nor, in any other type of case, is there any authority that a potential defendant has the right to explain his conduct to an administrator, prosecutor, law enforcement official or even the grand jury itself before an indictment is returned against him. See *United States ex rel. McCann* v. *Thompson*, 144 F.2d 604, 605 (2d Cir. 1944); *United States* v. *Niedelman*, 356 F. Supp. 979, 983-984 (S.D.N.Y. 1974). Indeed, the authorities make clear that there is no such right to an administrative conference at the IRS before an indictment can be voted. *United States* v. *Daly*, 481 F.2d 28, 30-31 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973); *United States* v. *Goldstein*, 342 F. Supp. 661 (E.D.N.Y. 1972); *United States* v. *Steinman*, 73 Cr. 216 (S.D.N.Y. June 29, 1973). See *Luhring* v. *Glotzbach*, 304 F.2d 560 (4th Cir. 1962). Finally, not only may a grand jury proceed independently of prior administrative action, it may explicitly use evidence obtained by an investigatory agency in derogation of a suspect's substantive constitutional rights. *United States* v. *Calandra*, 414 U.S. 338, 350 (1974); *United States* v. *Dornau*, *supra*, 491 F.2d at 481 n.15. It clearly follows that it may indict a defendant without inquiring into whether an administrative agency has complied with technical procedures which are not constitutionally required and whose violation would not serve to enhance the government's case or to preclude or impair a defense from being offered either before the grand jury itself or before a petit jury at trial.

In any event, the defendants' claim rests on provisions of the IRS regulations which they contend required that they be called to a conference at the Intelligence Division level before the matter could be referred to the Regional Counsel's office, so they could explain their conduct. But the right to such a conference was abolished on December 14, 1972.*

The right to a conference was contained in a variety of IRS regulations which govern its practices and procedures, *e.g.*, Internal Revenue Manual P. 9-32 and Section 9355 of the manual, which are not available to the public, and 26 C.F.R. 601.107(b)(2), which is available to the public. On December 14, 1972, the IRS reversed its own regulations requiring such a conference in the following memorandum order:

CC:E-137 JWS December 14, 1972

TO: ALL REGIONAL COMMISSIONERS
ALL REGIONAL COUNSEL

FROM: JOHN F. HANLON, Assistant Commissioner (Compliance)
LEE H. HENKEL, Chief Counsel

SUBJECT: Formal Conferences in Criminal Tax Cases

In furtherance of our major objective to reduce the lapsed time between the investigation and the litigation of criminal tax cases we have decided to eliminate the requirement for a formal interview with the principal in prosecution cases which have been held in the districts upon completion of the investigation. The principal will not be formally invited to attend a district conference. However, if towards the conclusion of an investigation, the taxpayer or his representative requests a meeting with district management officials, or if the Chief believes it will be in the best interest of the Service, a formal interview will be offered at a time and place convenient to the Service. We will continue to give the subject of a recommendation for prosecution every opportunity during the course of the investigation to explain his participation in the alleged criminal violation.

Effective immediately, the provisions of IRM 9355 are hereby revoked. The formal interview with the principal against whom a recommendation for prosecution may be made (IRM 9355.1) will no longer be offered as a matter of course.

[Footnote continued on following page]

As of that date, some six months prior to the filing of the indictment herein on June 21, 1973, the determination to hold such a conference became discretionary with the government. The absence of such a discretionary conference can in no way be said to have tainted the indictment in the case at bar. *See Sullivan* v. *United States*, 348 U.S. 170 (1954).

B. The evidence was more than sufficient to convict defendant Stofsky of income tax evasion.

Defendant Stofsky argues that there was no evidence he ever received any part of the $12,000 in cash Grossman handed to Gold in each of 1970 and 1971 and, hence, that the evidence was insufficient to sustain his convictions on Counts 25 and 26 for income tax evasion. The argument simply ignores the abundant circumstantial evidence tending to prove Stofsky was Gold's partner or co-venturer with respect to Grossman's payoffs and that he received a substantial portion of those illicit moneys.

Grossman paid Gold $12,000 in cash in 1970 and 1971 in semi-annual payments. The first of those payments in

---

The District Intelligence Offices must use their best judgment in deciding what information is to be furnished to the taxpayer during the investigation including the civil tax and penalities previously furnished at the formal interview (IRM 9355.3).

When the Chief, Intelligence Division, decides to recommend prosecution, he will prepare a letter notifying the principal that prosecution is being recommended and that the case is being referred to Regional Counsel.

* * * * *

s/ John F. Hanlon
s/ Lee H. Henkel

Thereafter, on April 12, 1973, the publicly available version of this IRS regulation was amended to reflect the change. 26 C.F.R. 601.107(b)(2).

1970 was preceded by a meeting between Grossman and Stofsky wherein Grossman detailed his readiness to continue to pay $12,000 a year for labor peace. That meeting ended without any agreement but a short while later Gold visited Grossman at his shop. Gold and Grossman there concluded the arrangements for the latter's payoffs designed to secure union peace, after Gold evidenced his knowledge of the contents of Grossman's earlier meeting with Stofsky—knowledge which Gold could have obtained only from Stofsky. Grossman's request for assurance that Gold was acting for Stofsky as well as for himself was answered by Stofsky's subsequent telephone call to Grossman confirming that fact.

Subsequent to the 1970 payoffs, Grossman met again with Stofsky in early 1971. He sought to assure Stofsky that he could continue to make the payoffs as before without jeopardy to any of them, notwithstanding that he, Grossman, had sold some portions of his firm to a third party. Stofsky said he would think about it. At a subsequent meeting, attended also by Gold, Stofsky first remarked that people go to jail for not being careful and then agreed to continue the payoff arrangement as before. Thereafter in 1971 Grossman paid Gold another 12,000 in cash. Subsequent to those payoffs, Stofsky met again with Grossman on several occasions—in late 1971 and early 1972—and discussed various facets of the continuing payoff scheme.

Given the foregoing evidence of favorable treatment accorded Grossman's firm, of the close relationship between Stofsky and Gold and of Stofsky's position of primacy in the union hierarchy, there was more than sufficient evidence for the jury to find that, with regard to the Grossman payoffs, Stofsky and Gold were partners or joint venturers and that Stofsky was receiving some

substantial portion of the moneys paid in the first instance to Gold.

Stofsky's attack on the testimony of Revenue Agent Passaretti of the IRS is misguided. Passaretti, a Revenue Agent for 30 years, testified only to the mechanical computation of income tax due and owing by Stofsky, based upon a hypothetical state of facts. Where, as here, there was evidence tending to prove the facts assumed in the hypothetical, such testimony from one qualified to give it is entirely proper. *United States* v. *Gray*, 507 F.2d 1013, 1017 (5th Cir. 1975); *Zacher* v. *United States*, 227 F.2d 219 (8th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956).

Notwithstanding defendants' assertion to the contrary (SB Br., p. 72), which is unsupported by any reference to the record, Passaretti made no purported findings of fact, nor did he opine that, in fact, Stofsky had received a part, more specifically one-half, of the Grossman payoffs. Passaretti testified only that with respect to the computation if, as the government contended, Gold had received the Grossman payoffs and if he and Stofsky were partners or joint venturers with respect to those payoffs, then one-half of the moneys Grossman paid to Gold would be allocated to Stofsky. This was in accord with the ordinary legal presumption, applicable in criminal income tax cases, that in the absence of an agreement to the contrary, income to the partnership is apportioned equally among the partners. *See United States* v. *Mancuso*, 378 F.2d 612, 616 (4th Cir.), *cert. denied*, 390 U.S. 955 (1967). See also 26 U.S.C. §§ 704, 761; N.Y. Partnership Law § 40 (McKinney's 1948).

Further, there is little danger that Passaretti's testimony somehow invaded the jury's province. Both before and after that testimony, the trial court carefully instructed the jury that Passaretti's testimony addressed

itself to a hypothetical situation only and that it would be for the jury, in the final analysis, to find the facts in the case (Tr. 1007, 1034). *See United States* v. *Cohen*, Dkt. No. 74-2026 (2d Cir. June 26, 1975) Slip op. 4405, 4426.

Finally, while concededly the government did not establish by direct evidence what portion of the Grossman payoffs Stofsky received, it is well settled that in a prosecution for income tax evasion, the government is not required to establish that some specific amount has been evaded. It is enough that the proof establishes that the amount evaded is substantial. *United States* v. *Marcus*, 401 F.2d 563 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 1969); *Fowler* v. *United States*, 352 F.2d 100 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966); and the trial court so instructed the jury (A 661a-662a). Accordingly, the jury could freely have rejected the presumption allocating income equally among partners and still have convicted Stofsky of the income tax evasions charged in Counts 25 and 26.

C. Venue for the charge of income tax evasion against defendant Gold, contained in Count 32, properly lay in the Southern District of New York.

Count 32 of the indictment charged defendant Gold with a violation of 26 U.S.C. § 7201, which makes it unlawful "willfully [to] attempt in any manner to evade or defeat" income tax. Gold asserts that venue for this charge did not properly lie in the Southern District of New York. He states that at all times charged in Count 32 he neither resided in the Southern District, nor had his tax returns prepared or filed in this District. He argues that, as a matter of law, the tax evasion offense was therefore not committed in the Southern District of New York. The argument is without merit.

Evidence was offered at trial that in his capacity as a union official Gold received, in this District, illegal payments from manufacturers. The government maintains that the acts taken by and on behalf of Gold to conceal his receipt of these illicit payments marked the beginning of his willful evasion of taxes, and that, consequently, venue was proper in the Southern District of New York.

In *Spies* v. *United States*, 317 U.S. 492 (1943), the Supreme Court, addressing itself to § 7201's predecessor, § 145(b) of the Internal Revenue Code of 1939, sought to define methods by which a willful attempt to defeat or evade taxation might be shown. The Court stated:

> "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its efforts to do so resulted in some unexpected limitation. Nor would we by definition construct the scope of the Congressional provision that it may be accomplished 'in any manner'. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, *concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind*, and any conduct, the likely effect which would be to mislead or conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *Id.* at 499 (emphasis added).

Thus, a tax evasion offense can be initiated by a covering up of income or a managing of one's affairs so

as not to prepare records which would normally reflect the receipt of income. And under 18 U.S.C. § 3237(a),* "the continuing offense" statute, venue in a tax evasion case will lie "wherever the attempt to evade taxes was *begun*, continued or completed." *United States* v. *Slutsky*, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974) (emphasis added).

Here, the government introduced evidence that Gold had surreptitiously received payments from manufacturers in the Southern District of New York; that care had been taken to insure that the transactions were in cash; and that normal business records had not been maintained. Since it is undisputed that the receipt of the money and the acts of concealment which initiated the offense charged in Count 32 had their locus in the Southern District of New York, venue was properly laid in this District. *See Beaty* v. *United States*, 213 F.2d 712, 715 (4th Cir. 1954), *vacated on other grounds*, 348 U.S. 950 (1955).**

---

* That section provides, in relevant part:

"Except as othewise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

** Gold argues that the mere receipt of illegal money does not constitute an evasion of taxes (SG Br., p. 73). The government does not disagree. There is language in *United States* v. *Gross*, 276 F.2d 816, 820 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960), indicating that a tax return must be prepared or mailed before a § 7201 violation is "completed". However, simply because the preparation or filing of a return is necessary to "complete" a tax evasion offense does not mean that acts of concealment cannot "begin" the offense or that the locus of the initiating acts of concealment is not a proper place to lay venue. See generally *United States* v. *Bithoney*, 472 F.2d 16, 22-24 (2d Cir.), *cert. denied*, 412 U.S. 938 (1973). Indeed, if venue were proper only in the district where an offense was "completed," the purposes of 18 U.S.C. § 3237(a) would be substantially undermined.

POINT VI

Defendants Stofsky and Gold were properly convicted of endeavoring to obstruct justice as charged in Count 24.

A. The legal and factual predicates of defendants' guilt were more than sufficient.

Defendants Stofsky and Gold were convicted in Count 24 of having endeavored to obstruct justice by corruptly requesting Jack Glasser—then under subpoena by the federal grand jury of this District investigating the furriers industry—to invoke his Fifth Amendment privilege to remain silent before that body. Defendants assert that since Glasser would legitimately have been entitled to invoke that privilege in that forum, they at most induced him to do no more than by law he was permitted to do. Hence, they reason, their convictions rest on a legally insufficient predicate and must be reversed. That argument simply ignores that it was the legality of defendants' conduct, not Glasser's, which was the subject of the obstruction of justice charged, and ignores the evidence of corrupt motive which informed defendants' advice to Glasser.

Defendants' argument is disposed of by *United States* v. *Cioffi*, 493 F.2d 1111, 1118-1119 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974), in which this Court recently held that one who with corrupt motives advises a witness to invoke the Fifth Amendment privilege to remain silent before a grand jury can and does endeavor to obstruct or to influence the administration of justice within the meaning Title 18, United States Code, Section 1503. "The focus is on the intent or motive of the party charged as an inducer. The lawful behavior of the person invoking the Amendment cannot be used to protect the criminal

behavior of the inducer." *Id.* at 1119. *Accord, Cole* v. *United States*, 329 F.2d 437, 442 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964).

Admittedly, absent a corrupt motive, "mere advice" to a witness to invoke the Fifth Amendment could not constitute a violation of Section 1503, and the trial court so instructed the jury.* Given the evidence here, however, it would be "nothing short of fantastic to suggest that [defendants' conduct constituted] no more than legitimate advice by a lawyer to a client, for the client's own protection." *United States* v. *Grunewald*, 233 F.2d 556, 571 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957).

Glasser testified that both shortly before and after his receipt of the grand jury subpoena, defendants had urged, suggested and told him "not to tell [them] anything, to take the Fifth" (Tr. 284).** Given the extensive evidence of the involvement of Stofsky and Gold in the illegal payoff scheme and Glasser's knowledge of that involvement, it can hardly be argued that the jury lacked sufficient evidence from which to conclude that

---

* The court's charge provided in pertinent part:

> "However, I instruct you that it is not a crime to be asked for the name of a lawyer, or to arrange a meeting with a lawyer for a witness, or to offer support for a pension, or to advise someone to take the Fifth Amendment, providing such offer or advice is made without any corrupt intent to influence the witness. It is for you, and you alone, to decide whether the evidence in this case leads you to conclude that both or either of the defendants charged in this count corruptly endeavored to [sic] (A 657a-658a).

** The assertion by defendants that the evidence showed only that they "suggested" to Glasser that he assert his privilege (SG Br., p. 76) is both inaccurate and, in light of *Cioffi* and *Cole*, irrelevant.

Stofsky and Gold counseled Glasser to remain silent out of bad motive, in an effort to keep secret their involvement in the crimes for which they now stand convicted. Defendants' assertions that the government failed to prove that they offered to obtain and pay for a lawyer for Glasser and offered to assist him to obtain his industry pension are belied by the evidence (see, *supra*, pp. 30-33) and by the jury's verdict to the contrary.* Moreover, the gist of the offense charged was the corrupt endeavor to silence Glasser. Section 1503 does not require that any sort of money or other consideration be offered or received before the endeavor can be considered corrupt. *United States* v. *Cioffi*, *supra*, 493 F.2d at 1119; *United States* v. *Grunewald*, *supra*, 233 F.2d at 570-571; *United States* v. *Poiakoff*, 121 F.2d 333 (2d Cir.), *cert. denied*, 314 U.S. 626 (1941); *Broadbent* v. *United States*, 149 F.2d 580 (10th Cir. 1945); *Bosselman* v. *United States*, 239 Fed. 82 (2d Cir. 1917).

---

* Defendants assert that the government failed to establish that they offered to obtain and pay for Glasser's lawyer because that offer was preceded by Glasser's demand for the same. That argument finds no support in either semantics or law. Defendants further contend that since the evidence showed that Glasser had been offered immunity by Hinckley if he agreed to tell what he knew, he was estopped from asserting the Fifth Amendment thereafter; and that since he had advised defendants of that offer at Tiffy's there was somehow a failure of proof. The argument is illogical and ignores, among other things, the fact that at the time of the corrupt endeavor Glasser had not yet received immunity nor was he certain to get it. Moreover, even had Glasser been immunized at the time in question, defendants' actions would still be legally punishable under Section 1503 since "impossibility" is no defense to such a charge. *United States* v. *Rosner*, 485 F.2d 1213, 1228-1229 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). *See also United States* v. *Cioffi*, *supra*.

B. Venue properly lay in the Southern District of New York.

Defendants Stofsky and Gold assert that the corrupt endeavor to induce Glasser not to testify before a grand jury of the Southern District of New York occurred, if at all, wholly within Queens at Tiffy's Luncheonette, and that, therefore, venue was improperly laid in the Southern District of New York. The argument is in error and simply ignores the numerous acts connected with the corrupt endeavor to obstruct justice which occurred in this District.

Beginning in March 1972, immediately after they learned federal investigators desired to speak to Glasser, but before Glasser had been subpoenaed, Stofsky and Gold attended several meetings with Glasser in Manhattan during which they urged him to reveal nothing of the payoff scheme and offered to facilitate the receipt of his industry pension.*

On April 4, 1972, shortly after he had been served with the subpoena, Glasser telephoned notice of that fact to Stofsky, who was in Manhattan. Stofsky sought un-

---

* Defendants argue that since Glasser had not yet been subpoenaed, the evidence of these meetings is irrelevant to the determination of the venue issue since, by the terms of Section 1503, no endeavor corruptly to influence "a witness" can occur prior to the time that that witness is subpoenaed (SG Br., p. 77 n.*). For purposes of Section 1503, however, "a witness" is "any one who 'knows or is supposed to know material facts, and is expected to testify to them or be called on to testify. . . .'" *United States* v. *Grunewald, supra,* 233 F.2d at 571. The statute reaches, therefore, even those "witnesses" who, though not yet served with a subpoena, are expected to testify to certain facts in the future. *Hunt* v. *United States,* 400 F.2d 306, 307-308 (5th Cir. 1968), *cert. denied,* 393 U.S. 1021 (1969). *See also United States* v. *Turcotte,* 515 F.2d 145, 149-150 (2d Cir. 1975).

successfully to persuade Glasser to come to Manhattan to discuss what to do next. At Glasser's insistence, Stofsky agreed to meet with him in Queens. Stofsky then telephoned Gold, who was also in Manhattan, and advised him of Glasser's call and the need to travel to Queens. Gold telephoned Glasser from Manhattan and obtained directions to Tiffy's in Queens, and thereafter he and Stofsky drove from Manhattan to Queens, where they met with Glasser. There Glasser detailed the day's events and told them he needed a lawyer whom they ought to supply. At Stofsky's direction, Gold telephoned the union's Attorney, Cammer, in Manhattan, who recommended another Manhattan attorney named Hammer for Glasser. Gold gave Hammer's name to Glasser and told him they would reimburse him for Hammer's fees. The following day, in Manhattan, Gold supplied Hammer's telephone number to Glasser's son. As a consequence of the foregoing, Hammer appeared in Manhattan for Glasser and secured an adjournment of the date on which Glasser was to appear before the federal grand jury of this District.

Even if the events antedating the service of the subpoena are excluded, the foregoing makes clear that there were numerous acts connected with the corrupt endeavor which occurred in the Southern District of New York. The jury could properly have found that acts constituting the corrupt endeavor to silence Glasser began in Manhattan at the instant in time that Stofsky, after receiving telephone notice that Glasser had been subpoenaed, sought to induce him to come to Manhattan to discuss the same; that it continued thereafter in both Manhattan and Queens; and that it was completed and came to rest in Manhattan when Hammer appeared for Glasser and obtained an adjournment of his grand jury appearance. *See United States* v. *Swann*, 441 F.2d 1053, 1056 (D.C. Cir. 1971) (concurring opinion). In light of the foregoing, there was a clearly sufficient basis for the jury's

finding, pursuant to unchallenged instructions (A 658a-659a), that venue properly lay in the Southern District of New York.

POINT VII

18 U.S.C. § 1962 (c) is not unconstitutionally vague.

Defendants assert that 18 U.S.C. § 1962(c), the statutory basis for Count 23, is unconstitutionally vague on its face and that the convictions on Count 23 should therefore be reversed. Section 1962(c) provides:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

The defendants concede that the terms "person," "enterprise," "racketeering activity," and "pattern of racketeering activity" are fully and adequately defined in 18 U.S.C. § 1961. They argue, however, that the phrase "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity leaves undefined the nature and type of relationship required between the racketeering activity and the operation of the enterprise. It is uncertain, they contend, whether the pattern of racketeering activity must be vital to the operations of the enterprise or whether the racketeering activity might be only marginally related to the normal operations of the enterprise. They conclude that this undefined relationship between the pattern of racketeering activity and operations of the enterprise deprived them of fair notice as to whether their conduct violated § 1962(c).

Confronted with this constitutional attack in a pretrial motion to dismiss, the District Court ruled that § 1962(c) was not unconstitutionally vague (A 25a-30a). The Court found that proof of a violation of § 1962(c) required the government to demonstrate (1) that the defendant committed two or more predicate offenses, which are set forth in § 1961; (2) that the predicate offenses were committed in the course of the defendant's employment by the enterprise; and (3) that the predicate offenses were connected by some common scheme, plan or motive and were not simply a series of disconnected acts. The Court rejected defendants' assertions that an additional element of a § 1962(c) violation was a prescribed relationship between the pattern of racketeering activity and the normal operation of the enterprise. The Court stated:

> "It is true that the statute does not define this connection by distinguishing between predicate acts which play a major or a minor role, or any role at all, in what might be seen as the usual operations of the enterprise; nor does it require that such acts be in furtherance of the enterprise, as defendants suggest it must.
>
> In this Court's view, the statute fails to state these requirements because Congress did not intend to require them in these terms. The perversion of legitimate business may take many forms. The goals of the enterprise may themselves be perverted. Or the legitimate goals may be continued as a front for unrelated criminal activity. Or the criminal activity may be pursued by some persons in direct conflict with the legitimate goals, pursued by others. Or the criminal activity may, indeed, be utilized to further otherwise legitimate goals. No good reason suggests itself as to why

> Congress should want to cover some, but not all of these forms; nor is there any good reason why this Court should construe the statute to do so. It plainly says that it places criminal responsibility on both those who conduct and those who participate, directly or indirectly, in the conduct of the affairs of the enterprise, without regard to what the enterprise was or was not about at the time in question. This may be broad, but it is not vague." (A 27a-28a).

Thus, the District Court's conclusion was that the relationship between the pattern of racketeering activity and the normal operations of the enterprise could not be characterized as "vague" for the simple reason that Congress had not intended to make this relationship an element of the offense, except to the extent that the racketeering activity must be shown to have been committed in the course of the defendant's employ by the enterprise.

The government is in full agreement with the conclusion of the District Court. In enacting § 1962, Congress intended a broad based attack on racketeers who were infiltrating legitimate business organizations. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 2, 78-79 (1969). This broad based attack would have been significantly blunted had Congress attempted to define—and thereby limit—the type of roles which racketeering activity must play in the operations of the enterprise. Consequently, in the absence of any indication that Congress intended to define this relationship, no such self-defeating approach should be attributed to our lawmakers.

But even assuming *arguendo* that Congress had intended to require proof that a certain relationship existed between the pattern of racketeering activity and the operations of the enterprise before a violation could be

made out, § 1962(c) would not be open to a Fifth Amendment vagueness attack. In order to violate § 1962(c), an offender must commit two predicate criminal offenses, which the defendants have conceded are clearly defined in § 1961. Also, the predicate offenses must be committed in the course of the violator's employ by the enterprise, and the predicate offenses must be in some fashion connected by a common scheme, plan or motive. Therefore, even if the predicate offenses were required to play a significant role in the operations of the enterprise, a defendant who had knowingly engaged in a pattern of racketeering activity while employed in an enterprise would surely be given fair notice that his contemplated conduct was either forbidden by § 1962(c) or approaching proscription by that statute. And in the area of business regulation, "it [is hardly] unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952).*

POINT VIII

The Strike Force attorney who presented this case to the grand jury had authority to do so.

Defendants assert that their post-conviction motion to dismiss the indictment on the ground that the Strike Force attorney who presented the case to the grand jury was not authorized to do so was incorrectly denied by the

---

* When a statute seeks to regulate business activities and does not impinge upon First Amendment freedoms, less stringent standards of precision are required. See *Smith* v. *Goguen*, 415 U.S. 566, 573 n.10 (1974); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963).

District Court. This Court's recent decisions, however, definitively dispose of that claim adversely to defendants. *In re Persico*, Dkt. No. 75-2030 (2d Cir., June 19, 1975); *In re Di Bella*, Dkt. No. 75-1121 (2d Cir., July 8, 1975) Slip op. 4665, 4669; *United States* v. *Eliano*, Dkt. No. 75-1035 (2d Cir., July 28, 1975) Slip op. 5157, 5159. Furthermore, the District Court correctly found that defendants' right to challenge the indictment on the grounds asserted here had been waived by their failure to move before trial for such relief, as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure (AA 148).

CONCLUSION

The judgments of conviction and orders of the District Court should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN C. SABETTA,
V. THOMAS FRYMAN, JR.,
LAWRENCE B. PEDOWITZ,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1975— 614—350—558

Jack and
as Shown
A. At
Sub
B. In
C. In

	1962	1963	1964	1965	1966	
A.						
Deposits As Shown in Bank Records Produced At Trial						
Cash Deposits						
Check Deposits						
Cash or Check Deposits						
			$ 0.00			
B.						
Deposits Shown In All Documents Subpoenaed By Defendants						
Cash Deposits						11
Check Deposits						1
Cash or Check Deposits						
						13
			$ 0.00			
C.						
Deposits First Shown In Additional Documents Subpoenaed By Government						
Cash Deposits	4,327.35	6,577.37	6,250.00			
Check Deposits	176.34	55.80	622.01			
Cash or Check Deposits	7,677.50	1,432.04	13,222.79	15,700.00		
	12,181.19	8,065.21	20,094.80	15,700.00		
			$56,041.20			
Total Deposits of B. and C.	12,181.19	8,065.21	20,094.80	15,700.00		1
			$56,041.20			

ADDENDUM

and Betty Glasser Deposits During 1962-1973
own in Bank Records Produced:
At Trial in Response To Defendants' Subpoenas
In Response to All of Defendants' Subpoenas
In Response to Government Subpoenas

1967	1968	1969	1970	1971	1972	1973	*Total*
3,966.29	9,050.00	15,326.88	9,813.80	1,220.40	3,050.91	486.60	
3,966.29	9,050.00	15,326.88	9,813.80	1,220.40	3,050.91	486.60	
		$38,156.97			$ 4,757.91		$ 42,914.88
11,151.05	10,950.00	22,500.00	9,650.00				
1,851.10	942.27	1,318.26	163.80	1,220.40	3,050.91	486.60	
50.00	3,000.00	82.57					
13,052.15	14,892.27	23,900.83	9,813.80	1,220.40	3,050.91	486.60	
		$61,659.05			$ 4,757.91		$ 66,416.96
	1,190.00	12,018.00	4,550.00	1,214.00	300.00	300.00	
	35.00	2,335.26	2,684.43	2,975.16	2,076.90	3,895.99	
		300.00			578.00	777.93	
	1,225.00	14,653.26	7,234.43	4,189.16	2,954.90	4,973.92	
		$23,112.69			$12,117.98		$ 91,271.87
13,052.15	16,117.27	38,554.09	17,048.23	5,409.56	6,005.81	5,460.52	
		$84,771.74			$16,875.89		$157,688.83

JCS:mkb
d-963

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN C. SABETTA, being duly sworn, deposes and says that he is employed in the office of Paul J. Curran, United States Attorney for the Southern District of New York, attorney for the United States of America herein.

That on the 12th day of September, 1975, he did serve two true copies of the hereto annexed brief on an employee of the firm of Weiss, Rosenthal, Heller & Schwartzman, attorneys for the appellants George Stofsky and Al Gold, located at 295 Madison Avenue, New York, New York 10017, in the Borough of Manhattan, City of New York, by handing two true copies of the same to said person in Room 845 of the United States Courthouse Annex, One St. Andrew's Plaza, New York, New York 10007.

John C. Sabetta

Sworn to before me this
12th day of September, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN C. SABETTA, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of September, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Rooney & Evans
521 Fifth Avenue
New York, New York 10017

Leonard B. Boudin, Esq.
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John C. Sabetta

JOHN C. SABETTA

Sworn to before me this

12th day of September, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977